137-604

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 115.

DAVID PRESTON, SAMUEL A. KEAN, AND ELISHA GRAY, PLAINTIFFS IN ERROR,

vs.

JAMES B. PRATHER AND THEODORE L. ROBINSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERNTS DIRICT OF ILLINOIS.

FILED SEPTEMBER 24, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 26, 1890.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, on Thursday, the third day of February, 1887, in the December term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

JAMES B. PRATHER and THEODORE L. ROBINSON, Copartners, and Doing Business under the Firm Name and Style of The Nodaway Valley Bank, at Maryville, Missouri, *vs.* DAVID PRESTON, SAMUEL A. KEAN, and ELISHA GRAY.	Trespass on the Case.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the sixth day of December, 1883, came the plaintiffs, by their attorneys, and filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons, and also at the same time filed their bond for costs in said above entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

UNITED STATES OF AMERICA, *State of Illinois.*

U. S. Circuit Court, Northern Dist. of Ill.

JAMES B. PRATHER and THEODORE L. ROBINSON, Copartners, Doing Business under the Firm Name and Style of The Nodaway Valley Bank, Citizens of the State of Missouri, Plaintiffs, *vs.* DAVID PRESTON, a Citizen of the State of Michigan, and SAMUEL A. Kean and Elisha Gray, Citizens of the State of Illinois, Doing Business under the Firm Name and Style of Preston, Kean & Co., and Frederick W. Crosby & James Payne, Citizens of Ill., defendants.

Damages, $20,000.

The clerk will please issue a summons in the above case.

LYMAN & JACKSON.

Endorsed: Filed Dec. 6, 1883. W. H. Bradley, clerk.

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3 *Bond for Costs.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. December Term, A. D. 1883.

JAMES B. PRATHER & THEO. L. ROBINSON, under Name of Nodaway Valley Bank,
vs.
PRESTON, KEAN, GRAY, *et al.* } Case.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and, in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, we hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this sixth day of December, A. D. 1883.

LYMAN & JACKSON.

Endorsed: Filed Dec. 6th, A. D. 1883. W. H. Bradley, clerk.

4 On the same day, to wit, on the sixth day of December, 1883, there issued out of said clerk's office a writ of summons in said entitled cause; which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

Summons.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon David Preston, Samuel A. Kean, and Elisha Gray, doing business under the firm name and style of Preston, Kean & Company, and Frederick W. Crosby and James Payne, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December instant, to answer unto James B. Prather and Theodore L. Robinson, doing business under the firm name and style of the "Nodaway Valley Bank," of a plea of trespass on the case, to their damage, as it is alleged, of twenty thousand dollars; and have you then and there this writ.

5 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago
[SEAL.] aforesaid, this sixth day of December, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the 108th year.

W. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

Know all men by these presents that I have appointed, and by these presents do appoint, Geo. N. Jones my true and lawful deputy to execute the annexed writ, James B. Prather *et al. vs.* David Preston *et al.*, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the *premises* and the hearing of Frederick W. Crosby and James Payne, therein named, on the 7th day of December, A. D. 1883. I did not serve the other defendant therein named by direction of plaintiffs' attorney.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

Geo. N. Jones, being duly sworn, deposes and says that he
6 served the annexed writ, as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 19th day of December, A. D. 1883.

[SEAL.] SAMUEL C. HAYES,
Notary Public.

Endorsed: Filed Dec. 22, A. D. 1883. W. H. Bradley, clerk.

Afterwards, to wit, on the seventh day of December, 1883, came the plaintiffs, by their attorneys, and filed in said clerk's office their declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1883.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss:

James B. Prather and Theodore L. Robinson, citizens and residents of the State of Missouri, United States of America, copart-

ners and doing business under the firm name and style of the Nodaway Valley Bank, at Maryville, Missouri, plaintiffs in this
7 suit, by Lyman & Jackson, their attorneys, complain of David Preston, a citizen and resident of the State of Michigan, United States of America; Samuel G. Kean, Elisha Gray, Frederick W. Crosby, and James Payne, citizens and residents of the State of Illinois, United States of America, defendants in this suit, of a plea of trespass on the case; for that whereas heretofore, to wit, on the 7th day of July, A. D. 1880, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, had caused to be delivered to the said defendants divers goods and chattels, to wit, sixteen United States four per. cent. bonds, 1907 consols, act July 14, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively D 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000 of lawful money, and to be redelivered by the said defendants to the said plaintiffs when the said defendants should be thereunto afterwards requested; and that the said defendants then and there had and received the said goods and chattels, and thereupon it then and there became and was the duty of the said defendants to redeliver the same to the said plaintiffs when they, the said defendants, should be thereunto after-
8 wards requested; and although the said defendants were afterwards, to wit, on the 28th day of November, A. D. 1883, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not, nor would when they were so requested as aforesaid, or at any time before or afterwards, redeliver the same to the said plaintiffs, but, on the contrary thereof, said defendants have not yet redelivered the same or any part thereof to the said plaintiffs, but to redeliver the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused and still do refuse.

And whereas also, to wit, on the 7th day of July, A. D. 1880, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, had caused to be delivered to the said defendants divers goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, and A 118,686, of the said plaintiffs, to wit, of the value of $16,000 of lawful
9 money, to be taken care of and safely and securely kept by

the said defendants for the said plaintiffs, and to be redelivered by the said defendants to the said plaintiffs when the said defendants should be thereunto afterwards requested; and that the said defendants had and received said goods and chattels, and thereupon it then and there became and was the duty of the said defendants to take proper care of the said goods and chattels and safely and securely keep the same and redeliver the same to the said plaintiffs when they, the said defendants, should be thereunto afterwards requested; and although said defendants were afterwards, to wit, on the 28th day of November, A. D. 1883, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver the said goods and chattels to the said plaintiffs, yet the said defendants, nor regarding their duty in that behalf, did not nor would take due and proper care of said goods and chattels nor safely and securely keep the same or any part thereof, nor did nor would when so requested as aforesaid or at any time before or after redeliver the same to the said plaintiffs, but, on the contrary thereof, the said defendants so carelessly behaved and conducted themselves with respect to the said goods and chattels and took such little care and such bad care thereof that by and through the carelessness and negligence of the
10 said defendants the said goods and chattels, being of the value aforesaid, to wit, on the day and year last aforesaid, became wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

And whereas also heretofore, to wit, on the 7th day of July, A. D. 1880, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, the said defendants, at their special instance and request, had the care of certain other goods and chattels, to wit, of goods and chattels of like number, quality, quantity, description, and value of the first-mentioned goods and chattels of the said plaintiffs, and it thereupon became and was the duty of the said defendants while they so had the care of the said goods and chattels to take due and proper care thereof; yet the said defendants, not regarding their duty in that behalf, did not nor would while they so had the care of the said last-mentioned goods and chattels take due and proper care of the same, but wholly neglected so to do and took such bad care thereof that afterwards and on the day and year last aforesaid the goods and chattels became and were greatly damaged and injured and were wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Wherefore the said plaintiffs say that they are injured and have sustained damages to the amount of $20,000, and therefore they bring this suit, &c.

By LYMAN & JACKSON,
Their Att'ys.

11 Endorsed: Filed Dec. 7, 1883. W. H. Bradley, clerk.

On the same day, to wit, on the seventh day of December, 1883, came David Preston, Samuel A. Kean, and Elisha Gray, by their

attorneys, and filed in said clerk's office their appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance.

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

In the United States Circuit Court for the Northern District of Illinois.

JAMES B. PRATHER and THEODORE L. Robinson, Copartners, Doing Business under the Firm Name and Style of The Nodaway Valley Bank, and Citizens of the State of Missouri, Plaintiffs,
vs.
DAVID PRESTON, a Citizen of the State of Michigan; and Samuel A. Kean and Elisha Gray, Citizens of the State of Illinois, Copartners, Doing Business under the Firm Name and Style of Preston, Kean & Company, and
12 James Payne and Frederick W. Crosby.
} Case. Damages, $20,000.

We hereby enter the appearance of the above defendants, David Preston, Samuel A. Kean, and Elisha Gray, in the above-entitled suit.

J. P. & T. R. WILSON;
Att'ys for said Def'ts.

Endorsed: Filed Dec. 7, 1883. W. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of January, 1884, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

United States Circuit Court.

JAMES B. PRATHER *et al.*
vs.
DAVID PRESTON } Case.

It is hereby stipulated and agreed that an amended declaration

may be filed herein at any time within five days from the date hereof.

J. P. & T. R. WILSON,
Att'ys for Preston, Kean & Gray.
LYMAN & JACKSON,
Att'ys for Plaintiffs.

January 9th, 1884.

Endorsed: Filed Jan'y 11, 1884. Wm. H. Bradley, clerk.

13 On the same day, to wit, on the eleventh day of January, 1884, in the December term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. PRATHER
vs.
DAVID PRESTON.

By agreement of the parties, as per stipulation filed, leave is given the plaintiff to file an amended declaration.

On the same day, to wit, on the eleventh day of January, 1884, came the plaintiffs, by their attorneys, and filed in said clerk's office their amended declaration in said entitled cause; which said amended declaration is in the words and figures following, to wit:

14 In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1883.

UNITED STATES OF AMERICA, } *ss.:*
Northern District of Illinois, }

First. James B. Prather and Theodore L. Robinson, citizens and residents of the State of Missouri, United States of America, co-partners, and doing business under the firm name and style of the Nodaway Valley Bank, at Maryville, Missouri, plaintiffs in this suit, by Lyman & Jackson, their attorneys, complain of David Preston, a citizen and resident of the State of Michigan, United States of America; Samuel G. Kean, Elisha Gray, Frederic W. Crosby, and James Payne, citizens and residents of the State of Illinois, United States of America, defendants in this suit, of a plea of trespass on the case, for that whereas heretofore, to wit, on the 7th day of July, A. D. 1880, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and
15 request of the said defendants, had caused to be delivered to the said defendants divers goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respect-

ively B 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000 of lawful money, and to be redelivered by the said defendants to the said plaintiffs when the said defendants should be thereunto afterwards requested; and that the said defendants then and there had and received the said goods and chattels, and thereupon it then and there became and was the duty of the said defendants to redeliver the same to the said plaintiffs when they, the said defendants, should be thereunto afterwards requested; and although the said defendants were afterwards, to wit, on the 26th day of November, A. D. 1883, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not nor would when they were so requested as aforesaid or at any time before or afterwards redeliver the same to the said plaintiffs,

16 but, on the contrary thereof, said defendants have not yet redelivered the same or any part thereof to the said plaintiffs; wherefore, by reason thereof, the said goods and chattels then and there became and were wholly lost to the plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Second. And whereas also, to wit, on the 7th day of July, A. D. 1880, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, had caused to be delivered to the said defendants divers other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, C 129,787, F 188,396, C 224,777, E 19500, C 10460, and A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000 of lawful money, to be taken care of and safely and securely kept by the said defendants for the said plaintiffs and to be redelivered by the said defendants to the said plaintiffs when the said defendants should be thereunto afterwards requested; and that the said defendants had and received said

17 goods and chattels, and thereupon it then and there became and was the duty of the said defendants to take proper care of the said goods and chattels and safely and securely keep the same and redeliver the same to the said plaintiffs when they, the said defendants, should be thereunto afterwards requested; and although said defendants were afterwards, to wit, on the 28th day of November, A. D. 1883, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver the said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not nor would take due and proper care of said goods and chattels nor safely and securely

keep the same or any part thereof, nor did nor would, when so requested as aforesaid or at any time before or after, redeliver the same to the said plaintiffs, but, on the contrary thereof, the said defendants so carelessly behaved and conducted themselves with respect to the said goods and chattels and took such little care and such bad care thereof that by and through the carelessness and negligence of the said defendants the said goods and chattels, being of the value aforesaid, to wit, on the day and year last aforesaid, became and were wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

18 Third. And whereas also heretofore, to wit, on the seventh day of July, A. D. 1880, to wit, at Chicago, in the northern district of Illinois aforesaid, the said defendants, at their special instance and request, had the care of certain other goods and chattels, to wit, of goods and chattels of like number, quality, quantity, description, and value of the first-mentioned goods and chattels of the said plaintiffs, and it thereupon became and was the duty of the said defendants, while they so had the care of the said goods and chattels, to take due and proper care thereof; yet the said defendants, not regarding their duty in that behalf, did not nor would, while they so had the care of the said last-mentioned goods and chattels, take due and proper care of the same, but wholly neglected so to do, and took such bad care thereof that afterwards and on the day and year last aforesaid the goods and chattels became and were wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Fourth. And whereas also heretofore, to wit, on the 7th day of July, A. D. 1880, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants certain other goods and chattels, to wit, sixteen United

19 States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13146, A 27213, and B 8921, and eight of said bonds being $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000, to be by the said defendants held in special deposit, subject to the order of the said plaintiffs for reasonable reward to the said defendants in that behalf; and the said defendants then and there had and received the said goods and chattels for the purpose aforesaid, and thereupon it then and there became and was the duty of the said defendants to redeliver the same to the said plaintiffs when they, the said defendants, should be thereunto afterwards requested; and although the said defendants were afterwards, to wit, on the 28th day of November, 1883, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver said goods and chattels to the said plaintiffs, yet said defendants, not regarding their duty in that behalf, did not nor would take due and proper

care of the said goods and chattels, nor did nor would, when they were so requested as aforesaid or at any time before or afterwards, redeliver the same to the said plaintiffs, but, on the contrary thereof, the said defendants so carelessly behaved and conducted themselves with reference to the said goods and chattels and took so little and bad care thereof that by and through the carelessness, negligence, or improper conduct of said defendants the said goods and chattels, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Fifth. And whereas also, to wit, on the 7th day of July, A. D. 1880, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants certain other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13126, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000, to be by the said defendants held in special deposit, subject to the order of said plaintiffs; and the said defendants then and there had and received the said goods and chattels for the purpose aforesaid, and thereupon it then and there became and was the duty of the said defendants to redeliver the same to the said plaintiffs when they, the said defendants, should be thereunto afterwards requested; and although the said defendants were afterwards, to wit, on the 28th day of November, A. D. 1883, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver the said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not nor would take due and proper care of the said goods and chattels, nor did nor would when they were so requested as aforesaid or at any time before or afterwards redeliver the same to the said plaintiffs, but, on the contrary thereof, the said defendants so carelessly behaved and conducted themselves with reference to the said goods and chattels and took so little and bad care thereof that by and through the carelessness, negligence, or improper conduct of the said defendants said goods and chattels, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Sixth. And whereas also heretofore, to wit, on the 7th day of July, A. D. 1880, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants certain other goods and chattels, to wit,

sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, D 44075, B 13128, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 138,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000 of lawful money, to be by the said defendants held as collateral security for the payment of a certain sum of money, to wit, the sum of $12,000 of lawful money, loaned and advanced, to wit, on the day and year aforesaid, by the said defendants to the said plaintiffs for a reasonable reward; and the plaintiffs aver that afterwards, to wit, on the 2nd day of May, 1880, to wit, at Chicago, to wit, at Chicago, in the northern district of Illinois, the said plaintiffs repaid the said defendants the said sum of money so loaned and advanced by the said defendants to the said plaintiffs;

23 and although the said defendants were afterwards, to wit, on the 28th day of November, A. D. 1883, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to redeliver the said goods and chattels so held as collateral security as aforesaid by the said defendants to the said plaintiffs, the said defendants contriving and intending to injure the said plaintiffs in this behalf and not regarding their duty in that behalf, did not nor would when they were so requested as aforesaid or at any time before or afterwards redeliver the same to the said plaintiffs, but, on the contrary thereof, said defendants have not yet redelivered the same or any part thereof to the said plaintiffs; wherefore, by reason thereof, the said goods and chattels then and there became and were wholly lost to the plaintiffs, to wit, at Chicago, in the northern district of Illinois as aforesaid.

Seventh. And whereas also, to wit, on the 7th day of July, 1880, to wit, at Chicago, in the northern district of Illinois as aforesaid, the plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants divers other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quar-

24 terly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000, lawful money, to be held as collateral security by the said defendants for the payment of a certain promissory note of $12,000 made by the said plaintiffs and, to wit, on the day and year aforesaid, discounted by said defendants for said plaintiffs and passed by said defendants, less the amount of the discount, to the credit of said plaintiffs on their books of account with said plaintiffs, and that afterwards, to wit, on the

second day of May, 1880, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, the said defendants charged said note of $12,000 up to the account current of the said plaintiffs with said defendants and returned said discounted note to the said plaintiffs; and although the said defendants were afterwards, to wit, on the 28th day of November, 1883, at Chicago, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by said plaintiffs to redeliver the said goods and chattels so held by the said defendants as collateral security to the said defendants, the said defendants, contriving and intending to injure the said plaintiffs, did not nor would when so requested as aforesaid or at any time before or afterwards redeliver the same to the said plaintiffs, but, on the contrary thereof, the said defendants have not yet redelivered the same or any part thereof; wherefore, by reason thereof, the said goods and chattels then and thereby became and were wholly lost to the plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Eighth. And whereas also, to wit, on the 7th day of July, A. D. 1880, to wit, at Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants certain other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 14075, B 13126, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively B 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10450, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000, to be by the said defendants held as collateral security for the payment of any drafts for money which said plaintiffs might make upon the said defendants in excess of the amount of money which at the time of drawing said drafts said plaintiffs might have on deposit with said defendants, for the payment of which said drafts for money in excess of the amount of money said plaintiffs might have on deposit with said defendants said defendants were to receive reasonable reward or interest; and the plaintiffs aver that although said drafts of money were made by the said plaintiffs upon the said defendants in excess of the amount of money which at the time of drawing said drafts said plaintiffs had on deposit with said defendants, and were afterwards paid by said plaintiffs to said defendants, and it then and there became the duty of the said defendants to redeliver the said goods and chattels to the said plaintiffs when they, the said defendants, should be thereafter requested, and although the said defendants were afterwards, to wit, on the 28th day of November, A. D. 1883, to wit, at Chicago, in the northern district of Illinois as aforesaid, requested by said plaintiffs to redeliver the said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not nor would, when so requested as aforesaid or at any time before or afterwards, redeliver the same to the said plaintiffs, but, on the

contrary, the said defendants have not yet redelivered the same or any part thereof to the said plaintiffs; wherefore, by reason thereof, the said goods and chattels then and there became and were
27 wholly lost to the plaintiffs, to wit, at Chicago, in the northern district of Illinois, as aforesaid.

Ninth. And whereas also, to wit, on the 7th day of July, A. D. 1880, to wit, at Chicago, in the northern district of Illinois as aforesaid, the said plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants certain other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly, January, April, July, and October, eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13126, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 189,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000 to be by the said defendants held as collateral security for any indebtedness in money which might arise and become due from the said plaintiffs to the said defendants; and the plaintiffs aver that though they did become indebted in money to the said defendants, and for which indebtedness said goods and chattels were held by the said defendants as collateral security, said indebtedness was afterwards and prior, to wit, to the 28th day of November, A. D. 1883, paid by the said plaintiffs to the said
28 defendants, and it then and there became and was the duty of the said defendants to redeliver the said goods and chattels to the said plaintiffs when they, the said defendants, should be thereunto afterward requested, and although the said defendants were afterwards, to wit, on the 28th day of November, 1883, to wit, at Chicago, in the northern district of Illinois as aforesaid, requested by the said plaintiffs to redeliver the said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not nor would, when they were so requested as aforesaid, or at any time before or afterwards, redeliver the same to the said plaintiffs, but, on the contrary, the said defendants have not yet redelivered the same or any part thereof to the said plaintiffs; wherefore by reason thereof the said goods and chattels then and there became and were wholly lost to the plaintiffs, to wit, at Chicago, in the northern district of Illinois, as aforesaid.

Tenth. And whereas also heretofore, to wit, on the 7th day of July, 1880, to wit, at the city of Chicago, in the northern district of Illinois, the said plaintiffs, who were, to wit, on the day and year aforesaid, depositors of and doing their banking business, to wit, at Chicago aforesaid, with said defendants, at the special instance and request of the said defendants purchased, to wit, on the day and year aforesaid, through and by the agency of the said
29 defendants, certain other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols act July 14, 1870, interest payable quarterly—January, April, July, and October—eight of said bonds being for $500 each,

marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000, which said goods and chattels were, to wit, on the day and year aforesaid, to wit, at Chicago, in the northern district of Illinois aforesaid, delivered to and retained by the said defendants in special deposit, subject to the order of the said plaintiffs, who were, to wit, on the day and year aforesaid, and continued to be for a long time thereafter, to wit, until the 28th day of November, 1883, to wit, at Chicago aforesaid, depositors of and continued to do their banking business, to wit, at Chicago aforesaid, with the said defendants, and then and there it became the duty of the said defendants to redeliver the said goods and chattels to the said plaintiffs when they, the said defendants, were thereafterwards requested, and although the said defendants were afterwards, to wit, on the 28th day of November, 1883, to wit, at Chicago, in the northern district of Illinois aforesaid, requested by the said plaintiffs to
30 redeliver the said goods and chattels, and, not regarding their duty in that behalf, did not nor would when they were so requested as aforesaid or at any time before or afterwards redeliver the same to the said plaintiffs, but, on the contrary thereof, said defendants have not yet redelivered the same or any part thereof; wherefore, by reason thereof, the said goods and chattels then and there became and were wholly lost as aforesaid, to wit, at Chicago, in the northern district of Illinois aforesaid.

Eleventh. And whereas also heretofore, to wit, on the 7th day of July, A. D. 1880, to wit, in Chicago, in the northern district of Illinois aforesaid, the said plaintiffs, who were, to wit, on the day and year aforesaid, depositors of and doing their banking business, to wit, at Chicago aforesaid, with the said defendants, at the special instance and request of the said defendants purchased, to wit, on the day and year aforesaid, through and by the agency of the said defendants, other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly—January, April, July, and October—eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13148, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777,
E 19500, C 10460, A 118,686, of the said plaintiffs, of great value,
31 to wit, of the value of $16,000, which said goods and chattels were, to wit, on the day and year aforesaid, to wit, at Chicago, in the northern district of Illinois aforesaid, delivered to and retained by said defendants in special deposit, subject to the order of the said plaintiffs, who were, to wit, on the day and year aforesaid, and continued to be for a long time thereafterwards, to wit, until the 28th day of November, 1883, to wit, at Chicago, in the northern district of Illinois aforesaid, depositors of and continued to do their banking business, to wit, at Chicago, with the said defendants, and the

said defendants then and there had and received the said goods and chattels for the purpose aforesaid; and the said defendants, not regarding their duty in that behalf, afterwards, to wit, on the day and year aforesaid, to wit, at Chicago, in the northern district of Illinois aforesaid, conducted themselves so carelessly, negligently, and improperly in and about the holding and care of the said goods and chattels that through and by the negligence and improper conduct of the said defendants in that behalf the said goods and chattels became and were wholly lost to the said plaintiffs, to wit, at Chicago, in the northern district of Illinois.

Twelfth. And whereas also, to wit, on the 7th day of July, A. D. 1880, to wit, in Chicago, in the northern district of Illinois
32 aforesaid, the said plaintiffs, at the special instance and request of the said defendants, caused to be delivered to the said defendants certain other goods and chattels, to wit, sixteen United States four per cent. bonds, 1907 consols, act July 14th, 1870, interest payable quarterly—January, April, July, and October—eight of said bonds being for $500 each, marked and numbered respectively B 6765, B 6766, D 75374, D 75375, B 44075, B 13128, A 27213, and B 8921, and eight of said bonds being for $1,000 each, marked and numbered respectively D 18418, J 173,403, G 129,787, F 188,396, C 224,777, E 19500, C 10460, A 118,686, of the said plaintiffs, of great value, to wit, of the value of $16,000, to be by the said defendants held in special deposit, subject to the order of the said plaintiffs, and the said defendants then and there had and received the said goods and chattels for the purpose aforesaid, and it then and there became the duty of the said defendants to redeliver the said goods and chattels to the said plaintiffs when they, the said defendants, were so requested by the said plaintiffs, and although, to wit, on the 28th day of November, A. D. 1883, to wit, at Chicago, in the northern district of Illinois aforesaid, the said defendants were requested by the said plaintiffs to redeliver the said goods and chattels to the said plaintiffs, yet the said defendants, not regarding their duty in that behalf, did not nor would, when so re-
33 quested as aforesaid or at any time before or afterwards, redeliver the same to the said plaintiffs, but, on the contrary, the said defendants have not yet redelivered the same or any part thereof to the plaintiffs; wherefore, by reason thereof, the said goods and chattels then and there became and were wholly lost to the plaintiffs, to wit, at Chicago, in the northern district of Illinois aforesaid.

Wherefore the said plaintiffs say that they are injured and have sustained damages to the amount of 20,000, and therefore they bring this suit, &c.

By LYMAN & JACKSON,
Their Att'ys.

(Endorsed:) Filed Jan'y 11th, 1884. Wm. H. Bradley, cl'k.

34 Afterwards, to wit, on the nineteenth day of February, 1884, there was filed in said clerk's office a stipulation in said

entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the Circuit Court of U. S. for the Northern District of Ill.

JAMES B. PRATHER *et al.* }
vs. }
DAVID PRESTON *et al.* }

It is hereby stipulated that a jury is waived in the above-entitled cause, and that said cause may be submitted to and be tried by the court without a jury.

J. P. & T. R. WILSON,
Att'ys for Preston, Kean & Gray.
LYMAN & JACKSON,
Att'ys for Pl'ffs.

Endorsed: Filed Feb'y 19, 1884. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-eighth day of February, 1884, came the defendants, by their attorneys, and filed in said clerk's office their plea in said entitled cause; which said plea is in the words and figures following, to wit:

35 *Plea.*

In the Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

DAVID PRESTON *et al.* }
ads. } Case.
JAMES B. PRATHER and THEODORE L. ROBINSON. }

And the said defendants, David Preston, Samuel A. Kean, and Elisha Gray, by J. P. & T. R. Wilson, their attorneys, come and defend the wrong and injury when, &c., and say that they are not nor is either of them guilty of the said supposed grievances above laid to their charge or any or either or any part thereof in manner and form as the said plaintiff hath above thereof complained against them; and of this they put themselves upon the country, &c.

J. P. & T. R. WILSON,
Att'ys for said Defendants.

And the said plaintiffs do the like.

LYMAN & JACKSON,
Att'ys for Pl'ffs.

Endorsed: Filed Feb. 28, 1884. W. H. Bradley, clerk.

36 Afterwards, to wit, on the ninth day of April, 1884, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

JAMES B. PRATHER *et al.* *vs.* DAVID PRESTON *et al.* } Trespass on the Case.

Whereas Frederic W. Crosby and James Payne have been made defendants in the suit of Prather *et al. v.* Preston *et al.*, in the United States circuit court for the northern district of Illinois;

And whereas the said Crosby & Payne are desirous of being dismissed from said suit:

Now it is hereby agreed that in case said Crosby & Payne are dismissed from said suit the said Preston, Kean & Co. shall at no time make any objection to said dismissal or by reason of said dismissal, and that the rights of said plaintiffs so far as Preston, Kean & Gray are concerned shall in no way be prejudiced by reason of said dismissal.

J. P. & T. R. WILSON,
Att'ys for Preston, Kean & Gray, Def'ts.
LYMAN & JACKSON,
Att'ys for Pl'ffs.

(Endorsed:) Filed April 9, 1884. Wm. H. Bradley, clerk.

37 On the same day, to wit, on the ninth day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. PRATHER *et al.* *vs.* DAVID PRESTON *et al.* }

By agreement of the parties, as per stipulation this day filed, it is ordered that this cause be dismissed as to the defendants, Frederick W. Crosby and James Payne, the defendants, Preston, Kean & Co., agreeing that they will at no time make any objection to said dismissal or by reason of said dismissal, and that the rights of said plaintiffs, so far as Preston, Kean & Gray are concerned, shall in no way be prejudiced by reason of said dismissal.

Afterwards, to wit, on the twenty-eighth day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES B. PRATHER *et al.*
vs.
DAVID PRESTON *et al.*

On motion of the plaintiffs, by their attorney, and with
38 notice to the defendants' attorney, it is ordered that upon the trial of this cause the defendants produce the letters, books, and documents mentioned in said notice.

39 Afterwards, to wit, on the twenty-seventh day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JAMES B. PRATHER and THEODORE L. ROBINSON
vs.
DAVID PRESTON, SAMUEL A. KEAN, and ELISHA GRAY, &c.
} Trespass on the Case.

Now come the parties, by their attorneys, and upon issue joined herein, by agreement of the parties, as per stipulation filed, they waive the intervention of a jury and for trial put themselves upon the court, and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-eighth day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JAMES B. PRATHER *et al.*
vs.
DAVID PRESTON *et al.*
} Trespass on the Case.

40 Now come again the parties, by their respective attorneys, and after hearing the concluding evidence upon the issue herein, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-ninth day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JAMES B. PRATHER *et al.* }
vs. } Trespass on the Case.
DAVID PRESTON *et al.* }

Now come again the parties, by their attorneys, and after hearing the arguments of the respective counsel upon the issue herein the court takes the same under advisement.

Afterwards, to wit, on the third day of January, 1887, Judge Gresham filed in said clerk's office his opinion in said entitled cause; which said opinion is in the words and figures following, to wit:

41

PRATHER *et al.* }
v. }
KEAN *et al.* }

GRESHAM, *J.*:

The plaintiffs, who were bankers at Maryville, Mo., opened an account in 1873 with the defendants, who were bankers at Chicago, and this relation continued until the spring of 1883. Interest was allowed the plaintiffs on their deposits above a certain amount at the rate of 2½ and 3 per cent. per annum, and the deposits averaged from $200,000 to $400,000 a year. On July 7, 1880, the defendants sold to the plaintiffs $12,000 of 4 per cent. Government bonds, for which the latter paid, including premium and accrued interest, $13,005. The letter which the plaintiffs wrote ordering the purchase concluded thus: "You will please send us description and numbers of the bonds and hold same as special deposit for us." In the account which the defendants rendered to the plaintiffs of the purchase the latter were informed that the bonds were held as a special deposit, subject to their order. The numbers of these bonds appeared upon the bond register which the defendants kept, and they remained in their custody until some time between November, 1881, and November 1882, during which period they were stolen by their assistant manager, Ker, who disappeared on January 16, 1883, and this suit is brought to recover their value.

On Oct. 8th, 1880, the plaintiffs wrote to the defendants, "Would it be convenient for you to discount for us, say, up to par of our bonds with you as collateral; and, if so, at what rate?" and

42 in reply to this, on October 11th, the defendants said, "We will discount for you with pleasure, taking your Government bonds at par as collateral." On Dec. 22nd the defendants discounted plaintiffs' note for $12,000, and on the same day notified them that the bonds were held as collateral security for the loan. This note was renewed, and when it became due, on April 27, 1881,

the defendants wrote the plaintiffs, "We debit you $12,000 for your note due to-day, which please find enclosed cancelled. What disposition shall we make of the collaterals?" The answer to this letter was not produced, but Robinson, one of the plaintiffs, testified that he directed the defendants to "hold the bonds as formerly for our (plaintiffs') use," and to furnish a list of them, giving numbers. On May 5th the defendants wrote to the plaintiffs, "Your favor of the 2nd inst. at hand. We hold $12,000 U. S. 4 % as special deposit," giving the numbers and informing the plaintiffs the bonds were held subject to their further orders. On Oct. 11, 1882, the defendant discounted the plaintiffs' note for $10,000 at 60 days, receiving as collateral security therefor a number of notes given to the plaintiffs by their customers. This note was paid at maturity and the collaterals returned.

Robinson testified that in a letter which he wrote to the defendants asking for the last loan he informed them the plaintiffs preferred giving the notes of their customers in place of the bonds as collateral, as they wished to use the bonds in case of emergency. He also stated that after the purchase of the bonds the plaintiffs had overdrawn their account from time to time, and that their overdrafts had been honored. On Nov. 24, 1880, the plain-
43 tiffs wrote to the defendants, "We are carrying a large amount of hogs and cattle at this time for our customers, and we shall wish to overdraw our account for a small amount, and we will thank you to honor the same and will consider our bonds in your hands as security for the same. We do not wish to overdraw, but stock may be detained on the road;" and two days later the defendants replied, "Yours of the 24th inst. received. In reply, we beg to say should you have occasion to check on us as you suggest we will pay your checks with great pleasure."

Robinson testified that on January 16, 1883, he wrote to the defendants, asking for another loan of $10,000 on the notes of their customers, as the plaintiffs wished to keep the bonds for emergencies, meaning to meet overdrafts as previously. On January 29th the defendants replied to this letter, apologizing for the delay which had occurred through oversight on the part of their corresponding clerk, saying, "We telegraphed you to-day that it is all right, meaning to say that your request for discount is granted." If the defendants did not know when they wrote this letter that Ker had stolen the bonds they had abundant reason for believing he had.

On March 5, 1883, the defendants wrote to the plaintiffs, "Do your books show that you should have a special deposit of Government bonds with us? If so, what issue of bonds and what amount?" To which the plaintiffs replied on March 8th, "We refer you to your advice of July 7, 1880, in regard to our bonds held by you."

44 Kean, one of the defendants, told Robinson, in July, 1883, so the latter testified, that he, Kean, did not know until about the middle of January of that year that Ker had stolen the bonds. At the time the plaintiffs demanded their bonds or their equivalent there was nothing due from them to the defendants, and the latter

refused to comply with the demand on the sole ground that the bonds were held as a special deposit without reward, and that they were not liable for their loss.

Ker acted as book-keeper for about ten years previous to May, 1881, when he became assistant cashier at a salary of $2,000 a year. The plaintiffs' bonds were kept in the "treasury" part of the safe, where the securities and reserve or surplus funds not in active use were kept. Ker took $21,500 of the defendants' funds and $35,000 in bonds, including those sued for. Kean also testified that he did not know when the plaintiffs' bonds were last seen in the vault; that it was their habit to examine their securities and count their cash every month and to examine their special deposits twice a year to see that they corresponded with the amounts marked on the envelopes and were otherwise correct; that the collaterals and special deposits were kept together; that Ker took none of the collaterals, presumably because he was aware of the habit of the bank to examine them and the cash, and that no record of the numbers of bonds held on special deposit was kept, and they could not be counted and checked off.

More than a year before Ker left the defendants were cautioned that some one in their bank was speculating on the board of trade.

Kean testified that after receiving this caution he made a
45 quiet investigation, and the facts pointed towards Ker, if any one; that he thereupon called Ker up and accused him of having been so speculating, to which he replied, "I have made a few transactions, but I am not doing anything now and do not propose to do anything more." He admitted that what he had done was against the rules of the bank, and said, "I know I ought not to do it and I am not going to do any more of it. I am ahead a thousand dollars, all told." Ker's salary appears to have been his only income. The defendants do not claim that he had accumulated any means or property from this or any other source, or that they thought he had, and yet they retained him in his position, which afforded him access to their own assets as well as the securities of others, without making any effort to verify the truth of his statements or ascertain whether he had been tempted to appropriate to his own use the property of others.

About two months before he left Preston, one of the defendants, residing at Detroit, wrote to the bank at Chicago calling attention to reported speculations of some of the employés on the board of trade, suggesting inquiry upon the subject and directing that a careful examination be made of their securities of all kinds. On receipt of this letter Kean told Ker what he had heard, and asked if he had not been speculating again on the board of trade. Ker said he had made some deals for friends in Canada, for which he had received a brokerage, and that the transactions were all ended. The defendants then seemed to entertain suspicion of Ker's integrity and an examination of their books and securities was commenced. No effort

was made, however, to see whether the special deposits had
46 been disturbed. Kean testified that the special deposits, including the plaintiffs' bonds, were not examined, because no

record was kept of them by numbers or otherwise, although the proof shows that the numbers of the plaintiffs' bonds did appear upon the defendants' bond register at the time of the purchase.

If the bonds were held as collateral security at the time they were stolen the defendants were obliged, as bailees for reward, to exercise that degree of care in their safe-keeping which a reasonably prudent and cautious man would exercise in the care of his own property of the same kind. It does not follow that they are not liable if they were as diligent in caring for these bonds as they were in taking care of securities of their own, for they may have been careless of the latter. If, however, the custody of the defendants at the time the bonds were stolen was only that of gratuitous bailees for safe-keeping, they are not liable for the loss unless it resulted from their gross carelessness.

National Bank *vs.* Graham, 100 U. S., 699.

When the first loan for which the bonds were pledged as security was paid and the defendants inquired what should be done with the collaterals they were directed by the plaintiffs to hold them, as formerly, for the plaintiffs' use and forward a list of them by numbers. The direction was not that the bonds be held as a special deposit or for safe-keeping. Evidently the defendants were informed that the plaintiffs expected to use the bonds as they had already been used, namely, as collaterals, and in informing the plaintiffs that the bonds were held as a special deposit, subject to their further orders,
47 the defendants doubtless intended to be understood as willing to hold the bonds as collateral security for future loans. The two banks had been in uninterrupted business relations for a number of years, during the greater portion of which time there was a balance, varying in amount, with the defendants in favor of the plaintiffs. The defendants deemed this account desirable and valuable. They cut off the coupons as they matured and placed the amount to the plaintiffs' credit. While, therefore, the bailment was for the convenience of the plaintiffs, it came about in the course of business between the two banks, and it was for their mutual benefit. If it be conceded, however, that the bonds ceased to be held as collaterals when the $12,000 note was paid, and they thereupon became a mere special deposit, the character of the bailment was changed by the subsequent agreement, whereby they remained in the custody of the defendants as a continuing security for advances made and to be made to the plaintiffs. The defendants were distinctly informed that, in order to accommodate on short notice such of their, plaintiffs', customers as were dealing in cattle and hogs, they might from time to time desire to overdraw their account on the security of these bonds as collaterals, and in order that they might be held for such emergencies the defendants discounted paper executed by the plaintiffs on the pledge of notes of the latter's customers. The evidence shows that this agreement continued in force until Ker fled, and that after it was made the plaintiffs did make overdrafts on the defendants, all of which were paid, some of them only a few months before

Ker's dishonesty was discovered. If these overdrafts were not
48 paid on the security of the bonds, they were paid without security, which is not to be presumed in the absence of proof. The defendants made frequent examinations to see that their own cash and securities were correct, but, according to their own testimony, neglected any examination with a view of ascertaining whether or not the plaintiffs' bonds had been disturbed.

The right of the defendants to hold the bonds against the plaintiffs and all others as collateral security for any balance due to them from the plaintiffs is too plain for dispute, and it follows that having this right their responsibility was that of pledgees.

It is immaterial, however, whether the defendants were bailees with or without reward, as in either case they are liable for the value of the bonds, the loss having resulted from their gross negligence. The defendants knew that Ker had been engaged in business which was hazardous and that his means were scant. The demoralizing effect of speculating in stocks and grain—more properly speaking, gambling on the rise and fall of the price of stocks and grain—is seen in the numerous peculations, embezzlements, forgeries, and thefts plainly traceable to that cause. Ker had free access to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet he was allowed to retain his position without any effort to see that he had not converted to his own use the property of others or that his statements were correct. A prompt examination after his first admission that he had been speculating would have doubtless shown that even then some of the plaintiffs' bonds had been exchanged for others, if indeed they had not been stolen. Ker's position was one of trust and great importance. His own admission showed that he was not trustworthy for such employ-
49 ment, and it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility.

Scott *v.* Nat. Bank, 72 Pa. St., 471.
Third Nat. Bank *v.* Boyd, 44 Md., 47.
Cutting *v.* Marlow, 78 N. Y., 454.

Endorsed: Filed Jan'y 3, 1887. Wm. H. Bradley, clerk.

50 Afterwards, to wit, on the third day of February, 1887, Judge Gresham filed in said clerk's office special findings in said above-entitled cause; which said special findings are in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Illinois.

PRATHER *et al.*
vs.
PRESTON *et al.*

I, Walter Q. Gresham, judge of said circuit court, do hereby certify that I find the following facts to have been proven by the evidence on the trial of the above-entitled case before me without the

intervention of the jury, the attorneys of record in said case having filed with the clerk a stipulation in writing waiving a jury namely:

That the plaintiffs, who were bankers at Maryville, Missouri, opened an account, in 1873, with the defendants, who were bankers at Chicago, and that this relation continued until the spring of 1883. Interest was allowed the plaintiffs on their deposits above $3,000 at the rate of 2½ per cent. and 3 per cent. per annum, and the aggregate amount of the deposits in each year averaged from $200,000 to $400,000.

On July 7th, 1880, the defendant sold to the plaintiffs
51 $12,000 of 4 per cent. Government bonds, for which the latter paid, including the premiums and accrued interest, $13,005.

All the communications between the plaintiffs and defendants in regard to the purchase of said bonds and the subsequent transactions in regard to said bonds prior to July, 1883, were conducted by letters.

The letter from the plaintiffs ordering the purchase of the said bonds concluded thus: "You will please send us description and number of the bonds, and hold same as special deposit for us."

In the account which the defendants rendered to the plaintiffs of the purchase the latter were informed that the bonds were held in special deposit subject to their order.

The number of these bonds appear upon the bond register which the defendants kept, and they remained in their custody until some time between November, 1881, and November, 1882, during which period they were stolen by their assistant cashier, Ker, who disappeared on January 16, 1883.

On October 8th, 1880, the plaintiffs wrote to the defendants:
"Will it be convenient for you to discount for us—say, up to
52 par of bonds with you as collateral—and, if so, at what rate?"

In reply to this, on October 11th defendants wrote: "We will discount for you with pleasure, taking your Government bonds at par as collateral."

On December 22nd the defendants discounted plaintiffs' note for $12,000, and on the same day notified them that the bonds were held as collateral security for the loan. Their note was renewed and about April 25th plaintiffs wrote to defendants to charge up the note to their account, and when it came due on April 27th, 1881, the defendants wrote the plaintiffs: "We debit you $12,000 for your note due to-day, which please find inclosed, cancelled." To which plaintiffs replied: "Hold the bonds, as formerly, for our use," and asked them to send them the numbers in order that the assessor might examine them, to which the defendants replied on May 5th: "Your favor of the 2nd inst. at hand. We hold $12,000 United States 4 per cent. as special deposit," in which letter defendants also gave the numbers of the bonds and informed the plaintiffs that the bonds were held subject to their further order.

On October 11th, 1882, the defendants discounted plaintiffs' note

* What disposition shall we make of the Collaterals?"

for $10,000 at 60 days, receiving as collateral security there-
53 for a number of notes given to the plaintiffs by their customers. This note was paid at maturity and the collaterals returned.

In the letter written by the plaintiffs asking for said last-mentioned loan they informed the defendants that they preferred giving the notes of their customers in place of the bonds as collateral and wished the bonds held for an emergency; that they probably might want to use the bonds.

Plaintiffs also stated that after the purchase of the bonds the plaintiffs had overdrawn their account from time to time, and that their overdrafts had been honored.

On November 24th, 1880, the plaintiffs wrote to the defendants: "We are carrying a large amount of hogs and cattle at this time for our customers and we shall wish to overdraw our account for a small amount, and we will thank you to honor the same, and will consider our bonds in your hands as security for the same. We do not wish to overdraw, but stock may be detained on the road." To which, two days later, the defendants replied: "Yours of the 24th inst. received. In reply we beg to state that should you have occasion to check on us, as you suggest, we will pay your checks
54 with great pleasure."

The account of plaintiffs with defendants was overdrawn as follows, as shown by defendants' books, viz:

November 28th, 1880, overdrawn	$537 75
November 29th, 1880, overdrawn	537 75
November 30th, 1880, overdrawn	721 00
November 21st, 1882, overdrawn	364 16
November 22nd, 1882, overdrawn	289 53
November 25th, 1882, overdrawn	820 58
November 26th, 1882, overdrawn	820 58

Between July, 1880, and January, 1883, the books of defendants, except on the days above mentioned, showed a balance to the credit of the plaintiffs.

The account of plaintiffs with the defendants was overdrawn as follows, as shown by plaintiffs' books:

November 22nd, 1880, overdrawn	$1,040 00
December 21st, 1880, overdrawn	5,426 00
March 21st, 1881, overdrawn	450 17
March 26th, 1881, overdrawn	2,560 17
January 13th, 1882, overdrawn	2,163 71
January 14th, 1882, overdrawn	2,334 96
September 14th, 1882, overdrawn	1,731 70
September 7th, 1882, overdrawn	1,903 62
September 12th, 1882, overdrawn	1,866 14
September 13th, 1882, overdrawn	1,547 29
September 14th, 1882, overdrawn	1,957 78
September 15th, 1882, overdrawn	2,330 15
November 17th, 1882, overdrawn	482 02

55	November 18th, 1882, overdrawn	$1,274 37
	November 20th, 1882, overdrawn	2,826 95
	November 21st, 1882, overdrawn	3,949 92
	November 22nd, 1882, overdrawn	4,207 42
	November 23rd, 1882, overdrawn	4,735 06
	February 1st, 1883, overdrawn	27 75

On January 16th, 1883, the plaintiffs wrote to the defendants asking for another loan of $10,000 on the notes of their customers as collateral, as plaintiffs wished to keep the bonds for emergencies, meaning that plaintiffs wanted to overdraw on them.

On January 29th the defendants replied to this letter, apologizing for the delay, which had occurred through the oversight of their corresponding clerk, saying, "We telegraphed you to-day that it is all right, meaning to say that your request for discount is granted."

On January 31st the plaintiffs replied, saying that there had been so great a delay since the application was made that the occasion had passed when they could use the funds to an advantage, and that they did not want them.

On March 5th, 1883, the defendants wrote to the plaintiffs: "Do your books show that you should have a special deposit of
56 Government bonds with us; if so, what issue of bonds and what amount?" To which the plaintiffs replied on March 8th: "We refer you to your advice of July 7th, 1880, in regard to our bonds held by you."

On March 12th, 1883, defendants wrote to plaintiffs acknowledging their letter of March 8th, and saying they presumed the package of bonds mentioned in their (defendants') letter of July 7th, 1880, "should now be found among those held on special deposit for our customers," and saying that they did not find plaintiffs' package, and that the bonds had undoubtedly been taken by the defaulter, Ker.

It also appears that defendants collected the coupons and credited plaintiffs with the same to January 1st, 1883, by written directions given by plaintiffs from time to time.

Frederick E. Ker acted as book-keeper for defendants for about ten years previous to May, 1881, and was the assistant cashier from May, 1881, to January, 1883, at a salary of $2,000 a year.

The plaintiffs' bonds were kept in the "treasury" part of the safe, where the collateral securities, the bonds of the bank, and the reserve or surplus fund of the bank not in active use were
57 kept. From the time Ker became assistant cashier until November, 1882, he had access to the funds and securities of the defendants and all the special deposits in the custody of the defendants. Ker took $21,500 of the funds of the defendants and $35,000 in bonds of other parties in the possession of the defendants, including these sued for. Plaintiffs' bonds were used by Ker for margins in speculating upon the board of trade in the city of Chicago.

Kean did not know when the plaintiffs' bonds were last seen in the vault. It appears that it was the custom of defendants to examine their securities and count their cash every month, and to ex-

amine their special deposits twice a year to see that they corresponded with the amounts marked on the envelopes and were otherwise correct. The collaterals and special deposits were kept together. Ker took none of the collaterals because, as Kean testified, Ker was well aware that defendants examined the collaterals, as they did their cash, to see if the collaterals were there.

No record was kept of the numbers of bonds held on special deposit, and they could not be counted and checked off for that reason.

About a year before Ker left some one said to Mr. Kean, "Mr.
58 Kean, I think there is some one in your bank speculating on the board." After Kean received this caution he made a quiet investigation, and the facts pointed toward Ker, if any one. He thereupon called Ker and accused him of having been speculating, to which Ker replied, "I have made a few transactions, but I am doing nothing now and don't propose to do anything more." Ker admitted that he had been speculating, and said, "I know I ought not to do it, and I am not going to do any more of it. I am ahead about $1,000, all told." It was not known that Ker had any other property besides his income that he received from his salary.

Ker continued in his possition as assistant cashier, with access to the funds of defendants, as well as the securities of others, without any effort on the part of the defendants to verify the truth of his statements or to ascertain whether he had been tempted to appropriate to his own use the property of others.

About two months before Ker left Preston, one of the defendants, residing at Detroit, received an anonymous communication stating that some one connected with the bank in Chicago was speculating on the board of trade. He thereupon wrote to the bank at Chi-
59 cago calling attention to the reported speculation of some of the employees, suggesting inquiry upon the subject and directing a careful examination to be made of their securities of all kinds. On receipt of this letter Kean told Ker what he had heard, and asked if he had been speculating again on the board of trade. Ker said that he had made some deals for friends in Canada, for which he received a brokerage, and that the transactions were all ended. Defendants then entered upon an examination of the books and securities, but no effort was made to see whether the special deposits had been disturbed. The special deposits, including the plaintiffs', were not examined, because no record was kept of them by numbers or otherwise, although the numbers of the plaintiffs' bonds did appear upon the defendants' bond register at the time of the purchase.

Kean, one of the defendants, told Robinson in July, 1883, that he (Kean) did not know until about the middle of January of that year that Ker had stolen the bonds.

On the 28th day of November, 1883, the plaintiffs demanded their bonds of the defendants, together with April, July, and October coupons, or their equivalent in money, on which day there
60 was nothing due from the plaintiffs to the defendants. The premium on the bonds at this time was 22⅜ per cent., and defendants refused to comply with the demands on the sole ground

55	November 18th, 1882, overdrawn	$1,274 37
	November 20th, 1882, overdrawn	2,826 95
	November 21st, 1882, overdrawn	3,949 92
	November 22nd, 1882, overdrawn	4,207 42
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56 Government bonds with us; if so, what issue of bonds and what amount?" To which the plaintiffs replied on March 8th: "We refer you to your advice of July 7th, 1880, in regard to our bonds held by you."

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It also appears that defendants collected the coupons and credited plaintiffs with the same to January 1st, 1883, by written directions given by plaintiffs from time to time.

Frederick E. Ker acted as book-keeper for defendants for about ten years previous to May, 1881, and was the assistant cashier from May, 1881, to January, 1883, at a salary of $2,000 a year.

The plaintiffs' bonds were kept in the "treasury" part of the safe, where the collateral securities, the bonds of the bank, and the reserve or surplus fund of the bank not in active use were
57 kept. From the time Ker became assistant cashier until November, 1882, he had access to the funds and securities of the defendants and all the special deposits in the custody of the defendants. Ker took $21,500 of the funds of the defendants and $35,000 in bonds of other parties in the possession of the defendants, including these sued for. Plaintiffs' bonds were used by Ker for margins in speculating upon the board of trade in the city of Chicago.

Kean did not know when the plaintiffs' bonds were last seen in the vault. It appears that it was the custom of defendants to examine their securities and count their cash every month, and to ex-

amine their special deposits twice a year to see that they corresponded with the amounts marked on the envelopes and were otherwise correct. The collaterals and special deposits were kept together. Ker took none of the collaterals because, as Kean testified, Ker was well aware that defendants examined the collaterals, as they did their cash, to see if the collaterals were there.

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Ker continued in his possition as assistant cashier, with access to the funds of defendants, as well as the securities of others, without any effort on the part of the defendants to verify the truth of his statements or to ascertain whether he had been tempted to appropriate to his own use the property of others.

About two months before Ker left Preston, one of the defendants, residing at Detroit, received an anonymous communication stating that some one connected with the bank in Chicago was speculating on

the board of trade. He thereupon wrote to the bank at Chi-
59 cago calling attention to the reported speculation of some of the employees, suggesting inquiry upon the subject and directing a careful examination to be made of their securities of all kinds. On receipt of this letter Kean told Ker what he had heard, and asked if he had been speculating again on the board of trade. Ker said that he had made some deals for friends in Canada, for which he received a brokerage, and that the transactions were all ended. Defendants then entered upon an examination of the books and securities, but no effort was made to see whether the special deposits had been disturbed. The special deposits, including the plaintiffs', were not examined, because no record was kept of them by numbers or otherwise, although the numbers of the plaintiffs' bonds did appear upon the defendants' bond register at the time of the purchase.

Kean, one of the defendants, told Robinson in July, 1883, that he (Kean) did not know until about the middle of January of that year that Ker had stolen the bonds.

On the 28th day of November, 1883, the plaintiffs demanded their bonds of the defendants, together with April, July, and October

coupons, or their equivalent in money, on which day there
60 was nothing due from the plaintiffs to the defendants. The premium on the bonds at this time was 22¾ per cent., and defendants refused to comply with the demands on the sole ground

that the bonds were held as special deposit without reward, and that they were not liable for the loss. The value of the bonds with the coupons thereon prior to the demand, not collected, was the sum of $15,045.00.

Upon the facts above stated the court found the issue for the plaintiffs; to which action of the court the defendants then and there excepted.

W. Q. GRESHAM.

(Endorsed:) Filed Feb'y 3rd, 1887. Wm. H. Bradley, cl'k.

61 On the same day, to wit, on the third day of February, 1887, in the December term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

JAMES B. PRATHER and THEODORE L. ROBINSON, Copartners, and Doing Business under the Firm Name and Style of The Nodaway Valley Bank, at Maryville, Missouri, *vs.* DAVID PRESTON, SAMUEL A. KEAN, and ELISHA GRAY.	Trespass on the Case.

Now come the parties, by their respective attorneys, and the court, having considered and being now fully advised upon the matters heretofore submitted herein, finds the said defendants guilty and assesses the plaintiffs' damages at seventeen thousand nine hundred and thirteen dollars and fifty-eight cents. It is thereupon considered and adjudged by the court that said plaintiffs do have and recover of said defendants, David Preston, Samuel A. Kean, and Elisha Gray, the said sum of seventeen thousand nine hundred and thirteen dollars and fifty-eight cents, their damages so as aforesaid found, together with their costs in this behalf expended, amounting to the sum of —— dollars and —— cents, and that they have execution therefor.

62 And on motion of the defendants, by their attorney, the court fixes the amount of the supersedeas bond herein at twenty-two thousand dollars.

63 Afterwards, to wit, on the fourteenth day of March, 1887, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, David Preston, Samuel A. Kean, and Elisha Gray, as principals, and William D. Preston, David W. Kean, Joseph M. Kean, and Benjamin F. Jacobs, as sure-

ties, are held and firmly bound unto James B. Prather and Theodore L. Robinson in the sum of twenty-three thousand dollars, to be paid to the said James B. Prather and Theodore L. Robinson, their executors and administrators; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Chicago, Illinois, this ninth day of February, A. D. 1887.

The condition of this obligation is such that whereas the said James B. Prather and Theodore L. Robinson did, on the third day of February, 1887, in the circuit court of the United States for the northern district of Illinois, recover a judgment against David Preston, Samuel A. Kean, and Elisha Gray for the sum of seventeen thousand nine hundred and thirteen and $\frac{58}{100}$ths dollars and costs of suit; and whereas the said David Preston, Samuel A. Kean, and Elisha Gray have sued out a writ of error from the Supreme
64 Court of the United States to reverse said judgment, which has been made a supersedeas:

Now, if the above-named David Preston, Samuel A. Kean, and Elisha Gray shall prosecute their said writ of error to effect and shall pay said judgment and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

DAVID PRESTON. [SEAL.]
SAMUEL A. KEAN. [SEAL.]
ELISHA GRAY. [SEAL.]
WILLIAM D. PRESTON. [SEAL.]
DAVID W. KEAN. [SEAL.]
JOSEPH M. KEAN. [SEAL.]
BENJAMIN F. JACOBS. [SEAL.]

Approved.
W. Q. GRESHAM.

Endorsed: Filed M'ch 14, 1887. Wm. H. Bradley, cl'k.

65 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein James B. Prather and Theodore L. Robinson, copartners, &c., are the plaintiffs, and David Preston, Samuel A. Kean, and Elisha Gray are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-first day of April, 1887.

WM. H. BRADLEY, *Clerk.*

66 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between James B. Prather and Theodore L. Robinson, copartners, &c., plaintiffs, and David Preston, Samuel A. Kean, and Elisha Gray, defendants, in an action of trespass on the case, a manifest error hath happened, to the great damage of the said David Preston, Samuel A. Kean, and Elisha Gray, defendants, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of February, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 111th year.

WM H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. David Preston, S. A. Kean, and Elisha Gray, plaintiffs in error, *vs.* James B. Prather and Theodore L. Robinson, &c., defendants in error. Writ of error. Copy deposited for the defendant- in error in the clerk's office U. S., northern district of Illinois.

67 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To James B. Prather and Theodore L. Robinson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein David Preston, Samuel A. Kean, and Elisha Gray are plaintiffs in error and James B. Prather and Theodore L. Robinson are defendants in error, to

show cause, if any there be, why the error in said judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, circuit judge, this 23d day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

W. Q. GRESHAM.

Service by copy accepted this 23d of March, 1887.

LYMAN & JACKSON,
Att'ys for Def'd'ts in Error.

[Endorsed:] Supreme Court of the United States. David Preston, Samuel A. Kean, Elisha Gray *vs.* James B. Prather and Theodore L. Robinson. Citation to October term, A. D. 1887.

68 Supreme Court of the United States.

DAVID PRESTON, S. A. KEAN, ELISHA GRAY, Plaintiffs in Error, *vs.* JAMES B. PRATHER, THEODORE L. ROBINSON, Def'ts in Error.	Writ of Error to Circuit Court for Northern District of Illinois.

Assignment of Errors.

Now come the plaintiffs in error herein, by John P. Wilson, their attorney, & show to the court that there is manifest error in the proceedings of the circuit court of the United States for the northern district of Illinois, as set forth in the foregoing record; that the said court erred in the following particulars:

1st. The court erred in determining from the facts stated in its special findings the issues in said cause in favor of the plaintiffs in said court.

2d. The court erred in holding that the facts found in its special findings were sufficient to entitle the plaintiffs in said court to recover the judgment entered by said court against the defendants therein.

3d. The court erred in rendering judgment against the defendants in said court upon the facts stated in its special findings.

All of which plaintiffs in error are ready to verify. Wherefore they pray that the determination and judgment of the said circuit court may be set aside and reversed, and for their costs.

JOHN P. WILSON,
Attorney for Plaintiffs in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 115. David Preston, Samuel A. Kean, and Elisha Gray, plaintiffs in error, *vs.* James B. Prather & Theodore L. Robinson. Filed September 24, 1887.

Office Supreme Court U. S.
FILED.
NOV 12 1890
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 115.

DAVID PRESTON, SAMUEL A. KEAN ET AL.,
Plaintiffs in Error,
vs.
JAMES B. PRATHER ET AL.,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

JOHN P. WILSON,
ATTORNEY FOR PLAINTIFFS IN ERROR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 115.

DAVID PRESTON, SAMUEL A. KEAN ET AL.,
Plaintiffs in Error,
vs.
JAMES B. PRATHER ET AL.,
Defendants in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

The judgment which is sought to be reversed by this suit was rendered for the value of certain bonds owned by defendants in error, which were stolen while in the possession of plaintiffs in error. The plaintiffs in error were bankers in the city of Chicago, and the defendants in error were bankers at Maryville, Missouri, and kept an account with plaintiffs in error at Chicago. In 1880 plaintiffs in error purchased the bonds in question for defendants in error, and retained them in their possession until the year 1882, about which date they were stolen by an employe of plaintiffs in error. Suit was brought to recover the value of the bonds, and the case was submitted to the court for trial without a jury, and resulted in a finding and a judgment in favor of defendants in error. The court made a certificate stating the facts

upon which the finding and judgment were based. Upon the facts as found, two questions arise. One as to whether the bonds were held as special deposits or in pledge; the other as to whether the bonds were lost through the negligence of plaintiffs in error.

Assignment of Errors.

First. The Circuit court erred in determining from the facts stated in its special findings the issues in said cause in favor of the plaintiffs in said court.

Second. The Circuit court erred in holding the facts found in its special findings were sufficient to entitle the plaintiffs in said court to recover the judgment entered by said court against the defendants therein.

Third. The Circuit court erred in rendering judgment against the defendants in said court upon the facts stated in its special findings.

Points.

First. The stolen bonds were held as a special deposit at the date when they were stolen.

Reynes v. *Dumont*, 130 U. S., 354.
Duncan v. *Brennan*, 83 N. Y., 487.
Wyckoff v. *Anthony*, 90 N. Y., 442.
Neponset Bank v. *Leland*, 5 Met., 259.

Second. The bonds being held on special deposit, plaintiffs in error would be liable for their loss only in the event of such loss being caused by their gross negligence, which is not established by the facts found by the court.

Foster v. *Essex Bank*, 17 Mass., 479.
Giblin v. *McMullen*, 2 L. R. P. C., 317.
Whitney v. *National Bank of Brattleboro*, 55 Vt., 154.
Bank v. *Rex*, 89 Pa. St., 308.
Tompkins v. *Saltmarsh*, 14 Ser. and Rawle, 275.
National Bank v. *Graham*, 100 U. S., 699.

Third. The facts found by the court are insufficient to sustain the judgment, even if the bonds were held under an agreement that the same should be collateral for overdrafts.

Smith v. *First National Bank*, 99 Mass., 605.
Bank v. *Rex*, 89 Pa. St., 308.
Scott v. *National Bank*, 72 Pa. St., 471.

I.

THE STOLEN BONDS WERE HELD AS A SPECIAL DEPOSIT AT THE DATE WHEN THEY WERE STOLEN.

All the communications between the plaintiffs and defendants relative to the purchase and holding of the bonds prior to their loss were in writing. The findings of the Circuit court, so far as they are material to the question under consideration, are as follows:

"On July 7, 1880, the defendants sold to the plaintiffs "$12,000 of four per cent. government bonds, for which "the latter paid, including premiums and accrued interest, "$13,005. All the communications between the plaint- "iffs and the defendants in regard to the purchase of said "bonds and the subsequent transactions in regard to said "bonds prior to July, 1883, were conducted by letters. "The letter from the plaintiffs ordering the purchase of "the said bonds concluded thus:

"You will please send us description and number of "the bonds and hold the same as special deposit for "us.

"In the account which the defendants rendered to the "plaintiffs of the purchase the latter were informed that "the bonds were held in special deposit subject to their "order. The numbers of these bonds appear upon the "bond register which the defendants kept, and they re- "mained in their custody until some time between No- "vember, 1881, and November, 1882, during which period "they were stolen by their assistant cashier, Ker, who "disappeared on January 16, 1883. On October 8, 1880, "the plaintiffs wrote to the defendants:

"Will it be convenient for you to discount for us, say "up to par of bonds with you, as collateral, and if so, at "what rate?

"In reply to this on October 11th, defendants wrote:

"We will discount for you with pleasure, taking your "government bonds at bar as collateral. * * *

"On November 24, 1880, the plaintiffs wrote to the "defendants:

"We are carrying a large amount of hogs and cattle "at this time for our customers and we shall wish to over- "draw our account for a small amount and we will thank "you to honor the same and will consider our bonds in "your hands as security for the same. We do not wish to "overdraw, but stock may be detained on the road.

"To which, two days later, the defendants replied:

"Yours of the 24th inst. received. In reply we beg to "state that should you have occasion to check on us as "you suggest, we will pay your checks with great "pleasure.

"The account of plaintiffs with the defendants was "overdrawn as follows, as shown by defendant's books, "viz:

"November	28,	1880,	overdrawn,	$537.75.
"	29,	"	"	537.75.
"	30,	"	"	721.00.
"	21,	1882,	"	364.16.
"	22,	"	"	289.53.
"	25,	"	"	820.58.
"	26,	"	"	820.58.

"Between July, 1880, and January, 1883, the books of "defendants, except on the days above mentioned, showed

"a balance to the credit of the plaintiffs. * * * On "December 22d (1880) the defendants discounted plaint- "iffs' note for $12,000, and on the same day notified them "that the bonds were held as collateral security for the "loan. Their note was renewed, and about April 25th "plaintiffs wrote to defendants to charge up the note to "their account, and when it came due on April 27, 1881, "the defendants wrote the plaintiffs:

"We debit you $12,000 for your note due to-day which "please find enclosed canceled. What disposition shall "we make of the collaterals?

"To which plaintiffs replied:

"Hold the bonds as formerly for our use; and asked "them to send them the numbers in order that the asses- "sor might examine them, to which the defendants re- "plied on May 5th:

"Your favor of the 2d inst. at hand. We hold $12,000 "United States 4% *as special deposit.*" In which let- "ter the defendants also gave the numbers of the bonds "and informed the plaintiffs that the bonds were held "subject to their further order.

"On October 11th, 1882, the defendants discounted "plaintiffs' note for $10,000 at 60 days, receiving as col- "lateral security therefor a number of notes given to "the plaintiffs by their customers. This note was paid "at maturity and the collaterals returned. In the letter "written by the plaintiffs asking for said last mentioned "loan, they informed the defendants that they preferred "giving the notes of their customers, in place of the "bonds as collateral, and wished the bonds held for an "emergency, that they probably might want to use the "bonds." (Record, pp. 24, 25.)

The books of the defendants in error showed their account with Preston, Kean & Company to have been overdrawn on nineteen different days between November 22d, 1882 and February 1st, 1883, for amounts varying from $27.75 to $5,426.

The above are the facts from which it is to be determined whether the bonds in question were held as special deposit between November, 1881, and November, 1882, during which time their loss occurred. When originally purchased, Preston, Kean & Co. were instructed to hold the bonds as special deposit, and in their account rendered of the purchase of the bonds, they expressly stated that the bonds were held in special deposit. In October, 1880, Prather & Robinson wrote to Preston, Kean & Co., inquiring whether they would discount for them up to the par of the bonds, with the bonds as collateral, which letter was answered in the affirmative. On November 24th, 1880, Prather & Robinson wrote stating that at that time they were carrying a large amount of hogs and cattle, and asking the privilege of overdrawing their account for a small amount, and that they would consider the bonds as security for the same. The account was overdrawn in pursuance of this notification on the 28th, 29th and 30th days of November, 1880, and the account was not overdrawn again until November 21, 1882, after the bonds were stolen. On December 22, 1880, the defendants in pursuance of the correspondence in October previous, discounted plaintiffs' note for $12,000, upon the bonds as collateral security for the loan. This loan was paid on the 27th day of April, 1881, when Preston, Kean & Co. inquired "what disposition shall we make of the collaterals," viz: the bonds, to which was replied, "Hold bonds as "formerly for our use"; whereupon Preston, Kean &

Co. replied on May 5th: "Your favor of the 2d "inst. at hand. We hold $12,000 United States four per "cent. bonds as *special deposit*." In the same letter defendants also gave the numbers of the bonds, and informed the plaintiffs that the bonds were held subject to their further order. There was no communication between the parties in relation to these bonds subsequent to the letter of May 5, 1881, above quoted, in which it was stated explicitely that the bonds were held as special deposit, except the letter in October, 1882, arranging for the discount of the $10,000 note, for which other notes were given as collateral, and in the letter arranging for which Prather & Robinson stated "that they preferred "giving the notes of their customers in place of the bonds "as collateral, and wished the bonds held for an emer- "gency; that they might probably want to use the bonds." We think it clearly appears from the foregoing facts that the bonds were by written agreement when first purchased clearly held in special deposit; that the arrangement in November, 1880, for an overdraft as collateral was by its terms a temporary arrangement only which was entirely superseded by the discount of the $12,000 note in December upon the bonds as collateral, and that the correspondence in the latter part of April, and first of May, 1881, restored the bonds to their original status as a special deposit. This was clearly expressed by the parties in their correspondence, and is entirely consistent with the subsequent transactions between the parties. It does not appear that Prather & Robinson ever again asked permission to overdraw their account, or that Preston, Kean & Co. ever agreed subsequently to pay any such overdrafts. It is true that the books of Prather & Robinson show a balance against them on

several days after November, 1880, and prior to the loss of the bonds, but this was a mere matter of book-keeping. When a draft was drawn by them against Preston, Kean & Co., it would be charged upon their books, although they might cause funds to be deposited to their credit with Preston, Kean & Co. before the draft would be presented for payment. There is nothing in the correspondence between the parties to show that any of these nominal overdrafts were made on the strength of these bonds as collateral. One of these overdrafts, and the largest of any of them, as shown upon Prather & Robinson's books, was on December 21, 1880, for $5,426. This overdraft would not appear upon the books of Preston, Kean & Co. for a day or two, but on the 22d of December, the next day, and as early as the overdraft could have reached Chicago, Preston, Kean & Co. had discounted Prather & Robinson's note for $12,000 upon these bonds as collateral. It is clear from Preston, Kean & Co's. books that funds were deposited to meet the draft which made this adverse balance upon the books of Prather & Robinson before the draft reached Chicago, and what is true in this case is equally true in the other cases where an adverse balance was shown upon the books of Prather & Robinson and not shown upon the books of Preston, Kean & Co.

To briefly restate the facts. It was distinctly requested and acceded to at the date of their purchase that the bonds should be held on special deposit. In November, 1880, it was agreed that Preston, Kean & Co. should honor small overdrafts upon the bonds as collateral. In December, 1880, Preston, Kean & Co. discounted a $12,000 note upon the Bonds as collateral, and when this note was paid it was agreed in writing between the partise

that the bonds should be held on special deposit, which agreement was not modified or altered in anywise up to the date of the loss of the bonds, which was prior to November, 1882.

The Circuit Judge in his opinion held that the bonds in question were held by Preston, Kean & Co. as collateral for future loans, but he arrived at this conclusion by a mistake as to the facts. In his opinion he says:

"If it be conceded, however, that the bonds ceased to "be held as collateral when the $12,000 note was paid, "and they thereupon became a mere special deposit, the "character of the bailment was changed by the *subsequent* "*agreement*, whereby they remained in the custody of the "defendants as a continuing security for advances made "and to be made to the plaintiffs. The defendants were "distinctly informed that in order to accommodate on "short notice such of their, plaintiffs' customers as were "dealing in cattle and hogs, they might from time to time "desire to overdraw their account on the security of these "bonds as collateral, and in order that they might be "held for such emergencies the defendants discounted "paper executed by the plaintiffs on the pledge of notes "of the latter's customers." (Rec., 22.)

The only evidence in regard to their wishing to accommodate their customers on cattle and hogs by overdrafts for which the bonds in question should be held as security, was contained in the letter of November 24, 1880. The bonds were pledged as collateral to the $12,000 discounted on the 22d day of December, 1880, and continued to be such collateral until the latter part of April, at which date it was agreed they should be held as a special deposit. There was no subsequent agreement, as stated in the opinion of the court, whereby they were to remain

in the custody of the plaintiffs as a continuing security for advances made and to be made to the plaintiffs. The court evidently labored under the misapprehension that the letter of November 24, 1880, in relation to overdrafts was written and received subsequent to the payment of the $12,000 note, whereas the fact is otherwise.

There was no agreement existing at the date of the loss of the bonds under which Preston, Kean & Co. had the right to hold the bonds as collateral security. The law upon the right of a bank to hold bonds in their possession under circumstances very similar to the case at bar was fully considered by this court in the case of *Reynes* v. *Dumont*, 130 U. S., 354, in which case the authorities upon this question were reviewed by the court, after which review the court say:

"The bonds were not lodged in the hands of the "Schuchardts in the ordinary course of banking business. "They were sent to New York for a specific purpose, "and, when that purpose was accomplished, permitted to "remain for 'safe keeping,' and because New York "was a better market than New Orleans, and the "express charges for their return very heavy, as is said "on one side; and for convenience in procuring loans as "is asserted on the other. But the loans made were al- "ways specific loans, and the bonds were always other- "wise subject to Cavoroc & Sons' call; and when the "Schuchardts themselves loaned, as they did once or "twice, it was upon an express pledge of a designated "number of the bonds as security."

What was true in that case is true in this case. In each case where the bonds were sought to be used it was on a specific application for that purpose and not a general indefinite pledge, and after the last time when

they were pledged there was a specific agreement that the bonds should be held as special deposit subject to the order of the owners. The course of conduct between the parties would clearly exclude any liens on these bonds for any purpose in the hands of Preston, Kean & Co.

Duncan v. *Brennan*, 83 N. Y., 487.
Neponset Bank v. *Leland*, 5 Met., 259.
Wyckoff v. *Anthony*, 90 N. Y., 442.

II.

THE BONDS BEING HELD ON SPECIAL DEPOSIT, PLAINTIFFS IN ERROR WOULD BE LIABLE ONLY IN THE EVENT OF SUCH LOSS BEING CAUSED BY THEIR GROSS NEGLIGENCE, WHICH IS NOT ESTABLISHED BY THE FACTS FOUND BY THE COURT.

It is well settled that a gratuitous bailee is liable only for gross negligence and that this is the measure of banks accepting bonds or other valuables for safe keeping without reward.

Foster v. *Essex Bank*, 17 Mass., 479.
Giblin v. *McMullen*, 2 L. R. P. C., 317.
Whitney v. *Brattleboro*, 55 Vermont, 154.
First Natl. Bank of Allentown, v. *Rex*, 89 Pa. St., 308.
Thompkins v. *Salt Marsh*, 14 Sergent and Rawle, 275.

The only question upon which the plaintiffs were charged with negligence by the Circuit court in this case was in retaining Kerr, who stole the bonds, in a position of trust and confidence after knowledge came to them that he had been speculating. The facts bearing upon

this point as stated in the certificate of the court contained in the record are as follows: (Rec., 26.)

"Frederick E. Ker acted as book-keeper for defend-
"ants for about ten years previous to May, 1881, and
"was the assistant cashier from May, 1881, to January,
"1883, at a salary of $2,000 a year.

"The plaintiffs' bonds were kept in the 'treasury' part
"of the safe, where the collateral securities, the bonds
"of the bank, and the reserve or surplus fund of the
"bank not in active use were kept. From the time Ker
"became assistant cashier until November, 1882, he had
"access to the funds and securities of the defendants and
"all the special deposits in the custody of the defendants.
"Ker took $21,500 of the funds of the defendants and
"$35,000 in bonds of other parties in the possession of the
"defendants, including these sued for. Plaintiffs' bonds
"were used by Ker for margins in speculating upon the
"board of trade in the city of Chicago.

"Kean did not know when the plaintiffs' bonds were
"last seen in the vault. It appears that it was the cus-
"tom of defendants to examine their securities and count
"their cash every month, and to examine their special
"deposits twice a year to see that they corresponded with
"the amounts marked on the envelopes and were other-
"wise correct. The collaterals and special deposits were
"kept together. Ker took none of the collaterals, be-
"cause, as Kean testified, Ker was well aware that de-
"fendants examined the collaterals, as they did their
"cash, to see if the collaterals were there.

"No record was kept of the numbers of bonds held on
"special deposit, and they could not be counted and
"checked off for that reason. About a year before Ker
"left, some one said to Mr. Kean, 'Mr. Kean I think

" there is some one in your bank speculating on the board.'
" After Kean received this caution he made a quiet in-
" vestigation and the facts pointed towards Ker, if any
" one. He thereupon called Ker and accused him of
" having been speculating, to which Ker replied, 'I have
" made a few transactions, but I am doing nothing now
" and don't propose to do anything more.' Ker admitted
" that he had been speculating and said, 'I know I ought
" not to do it, and I am not going to do any more of it.
" I am ahead about $1,000 all told.' It was not known
" that Ker had any other property besides his income
" that he received from his salary.

" Ker continued in his position as assistant cashier,
" with access to the funds of defendants, as well as the
" securities of others, without any effort on the part of
" the defendants to verify the truth of his statements or
" to ascertain whether he had been tempted to appropri-
" ate to his own use the property of others.

" About two months before Ker left Preston, one of
" the defendants, residing at Detroit, received an anony-
" mous communication stating that some one connected
" with the bank in Chicago was speculating on the board
" of trade. He thereupon wrote to the bank at Chicago
" calling attention to the reported speculation of some of
" the employes, suggesting inquiry upon the subject and
" directing a careful examination to be made of their se-
" curities of all kinds. On receipt of this letter Kean told
" Ker what he had heard, and asked if he had been spec-
" ulating again on the board of trade. Ker said that he
" had made some deals for friends in Canada, for which he
" received a brokerage, and that the transactions were al
" ended. Defendants then entered upon an examination
" of the books and securities, but no effort was made to

"see whether the special deposits had been disturbed. "The special deposits, including the plaintiffs', were not "examined, because no record was kept of them by "numbers or otherwise, although the numbers of the "plaintiffs' bonds did appear upon the defendants' bond "register at the time of the purchase."

From the foregoing statement it appears that the bonds were stolen before November, 1882, at which date Ker ceased to be assistant cashier and ceased to have access to the place where the bonds had been kept; that Ker disappeared in January, 1883, and that the only intimation or knowledge which Preston, Kean & Co. had that Ker was speculating is stated in the certificate as follows:

"About a year before Ker left, some one said to Mr. "Kean: 'Mr. Kean, I think there is some one in your "bank speculating on the board.' After Kean received "this caution he made a quiet investigation, and the facts "pointed toward Ker, if any one. He thereupon called "Ker and accused him of having been speculating, to which "Ker replied: 'I have made a few transactions, but I am "doing nothing now and don't propose to do anything "more.' Ker admitted that he had been speculating, "and said: 'I know I ought not to do it, and I am not "going to do any more of it. I am ahead about $1,000, "all told.'"

This took place a year before he left, which would be about the middle of January, 1882. The other communication shown in the evidence to have been received relative to some one in the employ of Preston, Kean & Co. speculating was received about two months before Ker left, which would be about the middle of November, 1882, after Ker had ceased to be assistant cashier and ceased to have access to the safe where the special de-

posits were kept, and after the bonds in question had been stolen, as shown by the certificate in the record. The bonds when stolen were used by Ker for margins in speculating upon the board of trade in the city of Chicago, and were lost in that way. It is evident that no act or omission to act on the part of Preston, Kean & Co. subsequent to November 1, 1882, in any way tended to cause the loss of the bonds, as the bonds had been stolen prior to that date, and Ker, the thief, had been removed from his position as assistant cashier. If Preston, Kean & Co. are to be held liable in this case it must be upon what transpired prior to November 1, 1882. The bonds were then lost. If at that date Preston, Kean & Co. had not been guilty of gross negligence, resulting in the loss, then they never were guilty of gross negligence resulting in loss of these bonds. All the facts, therefore stated in the certificate which transpired subsequent to November 1, 1882, throw no light upon the question at issue, viz: whether the bonds were stolen through the gross negligence of Preston, Kean & Co. Ker had been in the employ of Preston, Kean & Co. for more than ten years and had risen to the position of assistant cashier, with a salary of $2,000 a year. He had access to all the funds of Preston, Kean & Co., and had their entire confidence. After his admission that he had made a few transactions, they still continued to trust him, and permit him access to their own funds as well as the special deposits of others, and he stole of the funds of Preston, Kean & Co., $21,500, as well as taking the bonds held in special deposit. Do these facts establish that the bonds were lost through gross negligence on the part of Preston, Kean & Co.? The question of what constitutes gross negligence has been frequently discussed by the courts. The case

of *Foster* v. *Essex Bank*, *supra*, is a leading case upon this question. In that case the court after quoting from Blackstone as follows: (Page 501.)

"But now the law seems to be settled, that such a "general bailment will not charge the bailee with any "loss, unless it happens by gross neglect, which is con- "strued to be an evidence of fraud." * * * say: "The doctrine, as thus settled by reason and authority, "is applicable to the case of a simple deposit, in which "there is an accommodation to the bailor, and the ad- "vantage is to him alone. He shall be the loser, unless "the person in whom he confided has shown bad faith, "in exposing the goods to hazards to which he would not "expose his own. This would be *crassa negligentia*, and "for this alone is such a depositary liable." (Page 501.)

And again in the same opinion:

"The rule to be applied to this species of bailment "is, as has been stated, that the depositary is answer- "able, in case of loss, for *gross negligence* only, or *fraud* "which will make a bailee of any character answerable. "Gross negligence certainly cannot be inferred from any- "thing found by the verdict; for the same care was "taken of this as of other deposits, and of the property "belonging to the bank itself. The want of books, "showing the number and amount of deposits, is not a "culpable negligence; for the acceptance of the deposit "being voluntary, the bank was not obliged to incur any "labor or expense in this respect; and, besides, the agent "of the depositor required nothing but a memorandum "from the cashier; and this was more than he could have "insisted on as a right.

"As to the supposed neglect and carelessness of the

"directors, in not inspecting the cashier's accounts more "strictly so as to have detected his fraudulent manage- "ment of the books to cover his peculation, this con- "cerned the property of the company, not that of special "depositors; and the reputation of the cashier and gen- "eral confidence in him, found by the verdict, is a suffi- "cient answer to any charge of negligence in his original "appointment or continuance in office." (Page 507.)

The case of *Whitney* v. *National Bank of Brattleboro*, *supra*, was decided in 1881. The court through Redfield, Judge, says: (Page 158.)

"This is an action on the case charging the defendant "with negligence and want of care in keeping $4,000 of "U. S. bonds as a special deposit, and by which negli- "gence said bonds were lost. The defendant executed "and delivered to the plaintiff, on delivery of the bonds, "the following contract or receipt:

"The National Bank of Brattleboro, Brattleboro, Vt., "July 23, 1866. Received of J. D. Whitney, four thou- "sand dollars for safe keeping, as a special deposit. S. "M. Waite, C.

"The written contract states the understanding of the "parties, and by that the obligation and duties of the de- "fendant must be determined. The words in the con- "tract 'for safe keeping' merely express the purpose "of the deposit; and it would be implied if it had not "been expressed. It was, as we think, a naked deposit, "without reward. The possible conjectural benefit that "might accrue to the defendant by purchasing the cou- "pons, if the depositors should offer to sell them to the "bank, when there was no obligation to do so, is too re- "mote. The bank would be supposed to have provision "for greater security for the safe keeping of money and

"valuable papers than dwelling houses and other ordinary "buildings; and it would be implied that these bonds "were to be kept in the vault of the bank, and with the "same security as the bank afforded to valuables and pa- "pers of like character of its own; and a less degree of "care and diligence would be required than if the bonds "had been received by the defendant for hire and reward, "or for some temporary use of its own.

"The exact measure of responsibility of a naked "bailee, without reward, is stated in somewhat different "language by text writers, and in the adjudged cases. "Sir Wm. Jones states: 'That a bailee of this sort is "answerable only for *fraud* or for *gross* neglect, which "is considered as evidence of it, and not for such *ordinary* "inattentions as may be compatible with *good faith*.' "* * * In this case the measure of diligence is *that* "*which the bailee uses in his own affairs*.' The nature of "the property and purposes the parties had in view, as "appears from the quality of the property and character "of the act of deposit, are a part of the case. Banks "are instituted and its buildings constructed for the deliv- "ery in, and safe keeping of, money and money securi- "ties; and these bonds were deposited in the defendant's "bank for the greater security of the bonds, 'for safe "keeping.' And it must be implied that the defendant "undertook to use all the appliances for the security of "its own property for 'the safe keeping' of the plaintiff's "bonds, and in *good faith*. But it would not be liable "for the robbery or larceny of the bonds, unless there "was complicity or *bad faith*. * * * The rule of "law affecting this class of bailments (unless there be "special facts which qualify the duties which this case "does not disclose) would require this defendant, consid-

" ering the nature of the property, to have kept the bonds
" in *good faith*, within its safe, under all the safeguards
" afforded to like property of its own. This is the con-
" current rule of the civil and common law.' "

The case of *Allentown* v. *Rex*, 89 Pa. St., 308, was a suit brought to recover the value of bonds left on special deposit, which had been appropriated by the president of the bank to his own use. The court, in its opinion, said: (Page 312.)

" The learned judge of the court below was accurately
" correct when he instructed the jury that the defendant,
" in a case like that under consideration, was held only for
" gross negligence, and that it rested upon the plaintiff to
" show affirmatively that the bank was guilty of such
" negligence. He errs, however, when he comes to de-
" fine what the term ' gross negligence ' means. He says:
" ' In a case like the one before us, where slight care is
" required to be exercised on the part of the bailee, the
" defendant is liable only in case of gross negligence.
" Negligence is defined to be the absence of care, or the
" omission by a party to exercise that diligence which a
" prudent man ordinarily exercises in regard to his own
" property. Has the defendant in this case been guilty
" of that degree of negligence, viz: gross negligence? '

" Had this definition been omitted it might have been
" presumed that the jury, from the use of the terms
" slight care and gross negligence, would have reached a
" proper conclusion as to their meaning and effect, but in
" such case the presumption would be that the idea of
" ordinary care and ordinary prudence had been excluded,
" but this would necessarily exclude the learned judge's
" definition.

"The fact is the rule thus laid down by the court is "the one which our brother Woodward, in the case of "*The Bank* v. *Graham*, 29 P. F. Smith, 106, adduces as "decisive of the bailee's good faith and performance of "his whole duty. In other words, it is said by Duncan, "justice, in *Tompkins* v. *Saltmarsh*, 14 S. & R., 275, "'the bailee without reward is not bound to ordinary "diligence, is not reasonable for that care which every "attentive and diligent person takes of his own goods, "but only for that care which the most inattentive take.'

"It follows that if the defendant committed only a "breach of ordinary care and diligence in the keeping "of the plaintiff's bonds, the verdict should have been in "its favor."

In the case of *National Bank* v. *Graham*, 100 U. S., 699, which was a suit brought to recover United States bonds, Mr. Justice Swayne delivering the opinion of the court, said: (Page 702.)

"Gross negligence on the part of a gratuitious bailee, "though not a fraud, is in legal effect the same thing. "*Foster* v. *Essex Bank*, 17 Mass., 479. It is a tort, and "an action on the case is the appropriate remedy for "such a wrong."

In the case of *Giblin* v. *McMullen*, 2, L. R., P. C. Appeals, 317, which was a suit brought against a bank as bailee for a special deposit, the court say: (Page 336.)

"From the time of Lord *Holt's* celebrated judgment in "*Coggs* v. *Bernard*, in which he classified and distin- "guished the different degrees of negligence for which the "different kinds of bailees are answerable, the negligence "which must be established against a gratuitous bailee has "been called 'gross negligence,'" and, after reviewing

the authorities, continues: "The epithet 'gross' is "certainly not without its significance. The negligence "for which, according to Lord *Holt*, a gratuitious bailee "incurs liability is such as to involve *a breach of confi-* "*dence or trust not arising merely from some want of* "*foresight or mistake of judgment, but from some cul-* "*pable default.*"

It is clear in the case at bar that there was no breach of confidence or breach of trust on the part of Preston, Kean & Co. It is clear that the most that can be charged was a mistake of judgment which placed their own funds equally in jeopardy with those of others and which resulted equally in a loss to themselves as well as others. It seems to us that Mr. Kean, with his personal knowledge of Ker, in his own employ for a period of over ten years, was not bound to conclude from his taking two or three ventures on the board of trade that Ker was dishonest or capable of being dishonest. While it is true that many defaults and acts of dishonesty have arisen from speculation, it is equally true that a much larger number of men who have speculated have been honest and honorable, and respected members of the community. If every person who has had a transaction on the stock or grain exchange was to be thereby stamped as unworthy of trust or confidence but a small percentage of the men who stand high in the business community would remain who could be trusted. The great majority of the men who have had such transactions are trusted as honest men, and are so in fact. Every person has among his acquaintance persons in whose integrity and honor their confidence would not be shaken by such a transaction. It is true that it introduces an additional element of temptation and of hazard in the trust, but in arriving at a conclusion as to

any particular man the element of personal knowledge and of character enters largely into the conclusion which would be arrived at as to what weight should be given to such a fact. Kean had had an intimate personal knowledge and acquaintance with Ker for a long term of years, and from such knowledge and acquaintance it was his judgment that it was still safe, notwithstanding he had had several transactions on the board of trade, to trust him as assistant cashier, with the access thereby given him to all the funds of the firm, as well as those held on special deposit. In this there was no element of fraud or want of good faith. It was a mistake, but not such a mistake as amounts to gross negligence as that term is defined and held in the authorities.

III.

THE FACTS FOUND BY THE COURT ARE INSUFFICIENT TO SUSTAIN THE JUDGMENT, EVEN IF THE BONDS WERE HELD UNDER AN AGREEMENT THAT THE SAME SHOULD BE COLLATERAL FOR OVERDRAFTS.

To sustain the judgment it is essential that the negligence or fault of Preston, Kean & Co. should have been the cause of the loss of the bonds. If the bonds were stolen prior to any knowledge on the part of Preston, Kean & Co., that Ker had been speculating, then the loss of the bonds was not caused by their negligence. The certificate of the judge finds that the bonds were stolen between November, 1881, and November, 1882. It does not appear that Preston, Kean & Co. had any intimation or cause of suspicion that Ker had been speculating until after the middle of January, 1882. The circuit judge in his opinion says:

"A prompt examination after his (Ker's) first admis-
"sion that he had been speculating would have doubtless
"shown that even then some of plaintiff's bonds had been
"exchanged for others, if indeed they had not been
"stolen." (Rec., 23.)

In the case of *Smith* v. *First National Bank*, 99 Mass., 605, which was a suit brought to recover bonds held as a special deposit by a bank, the court, in its opinion, said: (Page 611.)

"The action is in tort, and the burden is upon the plaint-
"iff throughout. In order to charge the defendants with
"the loss he must show gross carelessness on the part of
"the bank in some respect affecting the safe custody of
"the bonds, or which occasioned their loss. * * *
"The plaintiff's evidence entirely failed to exclude the
"possibility of loss by other means than negligence of the
"defendants. It left the case, therefore, to be decided
"by mere inference, without any facts to determine which
"of several inferences was correct. * * * There
"being several inferences deducible from the facts which
"appear, and equally consistent with all those facts, the
"plaintiff has not maintained the proposition upon which,
"alone, he would be entitled to recover. There is strictly
"no evidence to warrant a jury in finding that the loss
"was occasioned by negligence and not by theft. When
"the evidence tends equally to sustain either of two in-
"consistent propositions, neither of them can be said to
"have been established by legitimate proof. A verdict
"in favor of the party bound to maintain one of those
"propositions against the other is necessarily wrong."

To the same effect is *Bank* v. *Rex*, *supra*.

The case above cited is directly in point upon the facts stated in the certificate. Preston, Kean & Company were guilty of no negligence prior to the middle of January,

1882. Upon the facts stated, it may as well be inferred that the bonds were stolen prior to that date as subsequent. Plaintiffs are only entitled to recover if they were stolen through the negligence of Preston, Kean & Company, and the burden of proof is upon them. The conclusion that they were stolen before the middle of January, 1882, and therefore without any negligence on the part of Preston, Kean & Company, is equally consistent with the facts found as the other conclusion that they were stolen after the middle of January, 1882. It therefore follows that the facts stated do not prove what is essential to sustain a judgment against Preston, Kean & Company, viz: That the bonds were stolen through their negligence, *i.e.*, after the middle of January, 1882. Indeed such a conclusion is not only equally consistent with the facts, but the circuit judge in his opinion states that doubtless such was the fact, viz., that the bonds or some portion of them were stolen prior to Ker's admission that he had been speculating. The question for this court, is, do the facts found sustain the judgment? To sustain the judgment it is necessary to find that the bonds were lost through the negligence of Preston, Kean & Company, and to sustain that proposition it is necessary to find the bonds were stolen subsequent to the middle of January, 1882. But that conclusion is not established by the facts found in the record, and therefore the judgment should be reversed.

In the event of a reversal it is proper that this court should direct a judgment to be rendered in favor of Preston, Kean & Company without a new trial.

Allen v. *St. Louis Bank*, 120 U. S., 20.
Fort Scott v. *Hickman*, 112 U. S., 150.,

Respectfully submitted.

JOHN P. WILSON,
Attorney for Defendants in Error.

Office Supreme Court U. S.
FILED.
OCT 27 1890
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

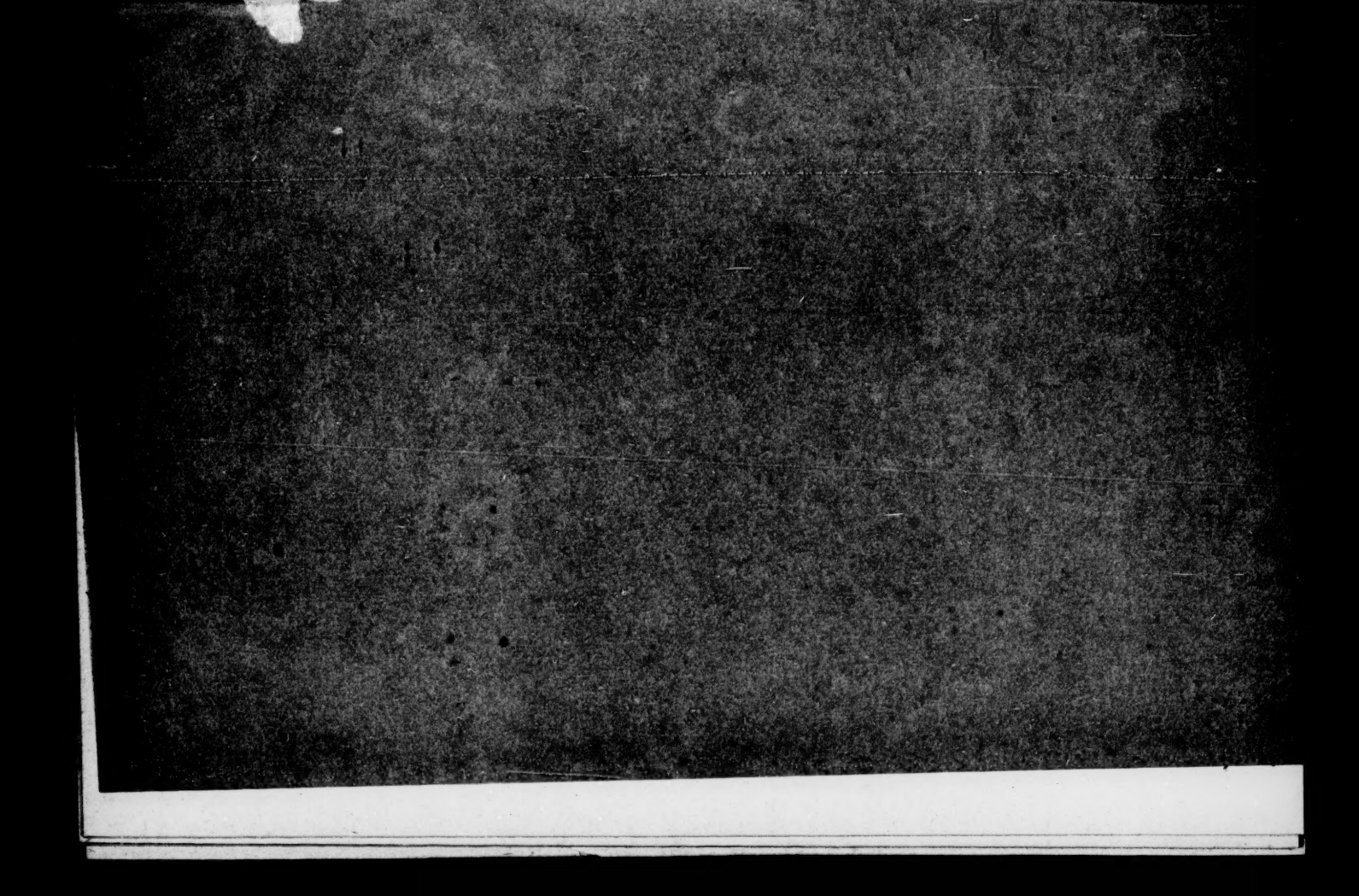
No. 115.

DAVID PRESTON, SAMUEL A. KEAN ET AL., *Plaintiffs in Error,*
vs.
JAMES B. PRATHER ET AL., *Defendants in Error.*

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR, SAMUEL A. KEAN.

P. S. GROSSCUP,
FOR PLAINTIFF IN ERROR, SAMUEL A. KEAN.



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I.

For twenty-two years before the 16th day of January, 1883, plaintiffs in error, in the firm name of Preston, Kean & Co., and its predecessors, did a successful banking business in the city of Chicago. Their business in bonds, government and municipal, aggregated about two million dollars annually, and their average deposits were about two million dollars. This, with their loans and discounts, necessitated the employment of from twenty-five to thirty persons as clerks, tellers, book-keepers, etc. The bank had, during this period, achieved a place among the financial institutions of the North-west, surpassed, in confidence, by none, in amount of business, by but few.

During the last ten years of this period Frederick M. Ker was in their employ. Beginning at the age of about twenty-two years as an under-book-keeper, he arose steadily into their confidence until May, 1881, when he was appointed assistant cashier. In this latter capacity he shared with Mr. Kean access to the inner safe or treasury of the bank, and had general supervision of the book-keeping of the institution.

Suddenly, on the 16th day of January, 1883, upon the pretext of taking a two weeks' rest, Ker fled the country, leaving behind him a note advising the firm that he had, during the year or two preceding, converted twenty-one thousand dollars of its cash, and thirty-five thousand dollars of bonds of its customers kept on special deposit.

The firm immediately set off in pursuit of the fugitive, and with such energy and success, that in April, 1883, he was captured in the city of Lima, in Peru, and brought back, by way of Honolulu and San Francisco, to Chicago. His prosecution immediately followed, resulting in his conviction, and sentence to the penitentiary for ten years—the longest period prescribed by the law.

The pursuit, capture, return, and trial of this defaulter, cost his employers more than twenty thousand dollars. The only criticism their conduct, in this respect, has called out, was that, in their eagerness to bring him to justice, they had overstepped some of the formalities prescribed by international extradition. This feature of their conduct was reviewed in this court, in *Ker* v. *The People of Illinois*, 119 U. S., page 436.

Among the bonds taken by Ker were sixteen United States four per cents, eight for five hundred dollars each, and eight for one thousand dollars each, belonging to the de-

fendants in error, a banking firm doing business at Marysville, Missouri. The action in the Circuit Court was to recover the value of these bonds, and resulted in a judgment in favor of the defendants in error, for their value at the time the demand was made therefor, and interest thereon to the date of the judgment.

The first question involved, touches the relation of the plaintiffs in error to these bonds at the time of their loss —were they pledgees, or bailees without reward?

The two banks came into business relations with each other in 1873, by the opening of an account, whereby the Marysville bank kept general deposits with the Chicago bank averaging, in amount, from two hundred thousand to four hundred thousand dollars a year; upon these the plaintiffs in error paid from two and a half to three per cent. interest.

On the 7th of January, 1880, the defendants in error requested the plaintiffs in error to purchase, and hold as a special deposit for them, the bonds in question. The purchase was accordingly made, and the defendants in error advised that the bonds were held on special deposit subject to their order.

On October 8, 1880, the defendants in error enquired: "Will it be convenient for you to discount for us, say up "to par, of bonds with you as collateral, and if so, at "what rate?" To which the plaintiffs in error responded: "We will discount for you with pleasure, taking your "government bonds at par as collateral." Accordingly, on the 22d of December following, the note of the defendants in error for twelve thousand dollars was discounted, and they were advised that the bonds were held as collateral security for the loan. Upon the maturity of a re-

newal of this note, April 27, 1881, the plaintiffs in error debited their account with this amount, and enclosed to them the note, cancelled; to which the defendants in error replied: "Hold the bonds as formerly for our use;" which letter was in turn answered by the plaintiffs in error as follows: "We hold twelve thousand dollars, "United States four per cents., as special deposit."

This is the only transaction between the parties, in which the character of the deposit was, in express terms, changed; and this transaction began, and ended, before any of the bonds had been converted by Ker—such conversion taking place between November, 1881, and November 1882.

On the 24th of November, 1880, about a month before the twelve thousand dollar note was discounted, as above stated, the defendants in error wrote: "We are carrying "a large amount of hogs and cattle at this time for our "customers, and we shall wish to overdraw our account "for a small amount, and we will thank you to honor the "same, and will consider the bonds in your hands as se- "curity for the same. We do not wish to overdraw, but "the stock may be detained on the road"; to which the plaintiffs in error replied: "We beg to state that should "you have occasion to check on us, as you suggest, we "will pay your checks with great pleasure."

It was contended in the Circuit Court by the defendants in error, that this correspondence was the initiation of an understanding, or agreement, whereby the defendants in error might, on occasions, overdraw their deposits upon the security of these bonds; and that by virtue of such understanding, or agreement, the bonds were, at all times thereafter, held as collateral security, or pledge, for possible future overdrafts. The findings upon which this theory is

based are: the correspondence of November 24th, and 26th, above stated; the fact that when, on the 11th of October, 1882, the defendants in error procured the discount of a note for ten thousand dollars, they gave, as collateral, certain notes of their customers, advising the plaintiffs in error that they preferred doing this, instead of giving the bonds, as they wished the bonds held for an emergency; the request on the 16th of January, 1883, of another loan of ten thousand dollars, secured by customers' notes, and accompanied with the statement that they wished to keep the bonds for emergencies; and the fact that on nineteen days between November 22, 1880, and February 1, 1883, inclusive, the books of the defendants in error showed their Chicago credit overdrawn by from twenty-seven dollars to fifty-four hundred and twenty-six dollars.

The plaintiffs in error, on the contrary, contended that the correspondence and transactions above stated did not prove the existence of the agreement claimed; and that there was, in fact, no intention that the bonds should be held as a pledge for future overdrafts, but that the permission for these occasional overdrafts was given on the strength of the general credit of defendants in error.

The finding of the Circuit Judge shows, that while the defendants in error on the nineteen occasions above referred to, overdrew their balance with the plaintiffs in error, such drafts were in some way overtaken, before they reached the Chicago bank; for there were but seven occasions, three in November, 1880, and four in November, 1882, when the account was actually overdrawn upon the books of the Chicago bank. Inasmuch as the bonds were stolen some time between November, 1881, and November, 1882, the defendants in error were not, in fact, indebted to the plaintiffs in error, on account of over-

drafts, upon any day when the bonds, or any one of them, were abstracted.

The second question involved is, whether the plaintiffs in error, in their retention of Ker in a position of confidence, giving him access to these bonds, were guilty of such negligence as makes them liable, in law, for their loss.

The plaintiffs in error kept no record showing the value, character or disposition of the property or securities held on special deposit. These, however, including the plaintiffs' bonds, were placed in envelopes, bearing an endorsement, indicating the original amount, and these put in the "treasury" of the bank, the securest portion of its safe, where also were kept the surplus fund and bonds of the bank, and its collateral securities.

The surplus fund was counted, and the collateral securities examined, ordinarily, once a month: the special deposits twice a year, to ascertain if they corresponded with the endorsements on the envelopes, and were otherwise correct.

It is not claimed that this manner of keeping the bonds exposed them to any danger of loss, except through the theft of officers of the bank having access to the treasury. Ker was one of these persons, having risen to this post of confidence after ten years of apparently faithful service. This confidence brought within his reach, alike, the funds of the bank, and the securities of its customers. The necessity of keeping run of the dates when the collateral securities, and their interest payments, matured, and of transmitting such interest, when collected, to the respective owners, was one of the chief reasons, probably, why Ker, on whom this duty fell, was given access to the vault.

Ker was a single man, with a salary of two thousand dol-

lars a year, and had no known habits connecting him with gambling, dissipation, or other vice. About a year before his flight some one said to Kean: "Mr. Kean, I think "there is some one in your bank speculating on the "board." A quiet investigation pointed to Ker, if any one. He was thereupon called by Mr. Kean, and charged with having been engaged in speculation, to which he replied: "I have made a few transactions, but I am doing "nothing now, and do not propose to do anything more"; and added: "I know I ought not to do it, and am not "going to do any more of it. I am ahead about one "thousand dollars all told." This statement, apparently truthful, of a past transaction, closed up without loss, and accompanied with Ker's realization that it was wrong, and his promise against repetition, left Kean's confidence in his integrity undisturbed. No effort, therefore, was made to verify the truth of the statement, or to ascertain if Ker had appropriated any of the securities, or special deposits, of the bank. It does not appear, however, that such effort, if made, would have disclosed his peculations, or would have shown that his transactions on the board were other than as he had stated them. In fact it does not appear, that any of the bonds in question were appropriated by Ker after the incident above named. They were taken during a period. both antedating and post dating this incident, but whether before *or* after, the finding of facts does not show.

As a matter of fact, *sometime* between November, 1881, and November, 1882, Ker was engaged in stealing the funds of the bank, and the bonds in its custody, and using them to margin dealings on the board of trade. These peculations were covered up by numerous false entries, and ingenious tricks, which subsequently, even with the

aid of his confession, it took months to fully unravel. After the incident above related, no information reached the plaintiffs in error, calculated to arouse their suspicion, until November, 1882. About this time, Preston residing at Detroit, received an anonymous communication stating that some one connected with the bank was speculating on the board. He thereupon wrote to the bank at Chicago, calling attention to this report, suggesting an inquiry therein, and directing a careful examination into the bank's securities of all kinds. Ker was immediately confronted by Kean with this new information. Ker explained by saying that he had made some transactions for friends in Canada, for which he received a brokerage only. But the plaintiffs in error, notwithstanding this explanation, immediately started an examination of the books and securities, and excluded Ker from further access to the safes. The special deposits were not then examined, because there was no record with which to compare them; but none of such special deposits, or of the bonds in question, were thereafter stolen. It does not appear, that had the fact of their theft been then known, it would have brought about their recovery, either by the bank, or by the defendants in error.

Upon these facts the Circuit Judge held that the bonds in question were, at the time of their theft, held by the plaintiffs in error in pledge, and that, in any event, the plaintiffs in error, in respect to the method of their custody, and by the retention of Ker, after the incident above related occurred, were guilty of gross negligence. The facts upon which this judgment was based are incorporated in a special finding.

II.

The errors assigned and urged are:

First. The Circuit Court erred in determining, from the facts stated in its special findings, the issues in said cause in favor of the defendants in error.

Second. The Circuit Court erred in holding that the facts found in its special findings were sufficient to entitle the plaintiffs in said court to the judgment entered in said court.

Third. The Circuit Court erred in rendering judgment against the defendants in said court, upon the facts stated in its findings.

III.

Our points of law, and of fact, are as follows:

First. There was, on no day of the period covering the theft of the bonds in question, any indebtedness owing by the defendants in error. The bonds, therefore, could not have been in custody, at the time of their theft, as collateral to a present indebtedness.

Second. There was no agreement, whereby the bonds were to be held as collateral to future advances or overdrafts.

Third. But in either case, whether the bonds were held in pledge, or on special deposit, the plaintiffs in error

were not required to exercise toward them greater care, than persons of common prudence usually bestow upon their own property, under like circumstances.

Schouler's Bailments and Carriers, 2d Ed. Par., 204.
2 Kent Com., 578.
Story Bailments, Par. 332 and cases therein cited.

Fourth. If the bonds were held on special deposit, at the time of their loss, the absolute test of liability, according to a strong line of authorities, is as follows: Did the bailees exercise toward the bonds the same care bestowed upon their own property.

Foster v. *Essex Bank*, 17 Mass., 479.
First Nat. Bk. v. *Ocean Nat. Bk.*, 60 N. Y., 278.
Jones on Bailments, 10, 46, 119.

Fifth. At least, the fact that the bailees have given to the pledge, or special deposit, the same care bestowed upon their own property, under like circumstances, is very strong presumptive evidence of due care.

Giblin v. *McMullin*, 2 L. R. P. C., 317.
Nat. Bk. v. *Rex*, 89 Pa. St., 308.

Sixth. The loss of the bonds by theft being admitted, the burden of proving every act, or omission, upon which negligence is based, is upon the defendants in error.

Smith v. *First Nat.*, 99 Mass., 605.
First Nat. Bk. v. *Rex*, *supra*.

Seventh. It is not proper to infer negligence from acts or omissions, although such inference may seem reasonable, in cases where the inference of due care is, *also*, reasonably consistent with such acts and omissions.

Smith v. *First National Bank*, 99 Mass., 605.

Eighth. The judgment of the Circuit Court ought not to be sustained, unless the acts and omissions stated in its findings, were the *proximate cause* of the loss of the bonds.

Shearman & Redfield on Negligence, par. 26.

Scheffer v. *R. R. Co.*, 105 U. S., 249.

Ninth. The plaintiffs in error exercised toward these bonds the same care bestowed upon their own property, and such care as persons of common prudence usually bestow upon their own property, under like circumstances.

Tenth. When there is a special finding of particular acts or omissions, upon which liability is based, the question, whether such acts or omissions constitute negligence —a breach of legal duty—is a pure question of law.

Shearman and Redfield on Negligence, 4th Ed., Par. 52.

IV.

Were the bonds, at the time of their theft, held by the plaintiffs in error as collateral to a present debt?

This is clearly negatived by the special finding of facts. The bonds were stolen some time between November, 1881, and November, 1882. (Print. Rec., 24.) The

$12,000 note, to which they had been collateral, was paid and canceled April 27, 1881. There were no overdrafts upon the books of the plaintiffs in error between November 30, 1880, and November 21, 1882. (Print. Rec., 25.)

The overdrafts shown on the books of the defendants in error within this period, is, in this connection, of no pertinence. Such overdrafts did not constitute an *actual* debt until they had reached the Chicago bank; but the moment they thus reached the Chicago bank they appeared upon its books. The books of the plaintiffs in error, therefore, are the only ones that correctly show the overdrafts, not overtaken by credits before they reached the Chicago bank.

Was there an agreement, covering the period from November, 1881, to November, 1882, whereby these bonds, at all times during such period, should be held, by the plaintiffs in error, as collateral for future advances on account of overdrafts.

One of the evidences upon which this claim is based is the letter of defendants in error, of November 24, 1880. (Print. Rec., 25.) The occasion of this letter was the fact that stock was then being shipped, and in danger of being detained on the road. It asked for permission, in case of such detention, to overdraw their account, and offered the bonds as security. This letter makes no allusion to a *continuing* agreement for overdrafts. It was evidently intended to provide for the present emergency only. The reply of the plaintiffs in error is simply an announcement that the checks would be paid. There is no allusion to security, and certainly no promise extending beyond the immediate occasion.

That this correspondence was not intended as the initi-

ation of a *continuing* arrangement, whereby the defendants in error could, at pleasure, overdraw their account upon the security of these bonds, is plainly shown by the following circumstances:

(*a.*) On the 8th of October preceding, the defendants in error wrote: "Will it be convenient for you to "discount for us, say up to par of bonds with you as col- "lateral, and if so, at what rate?" receiving on the 11th of October this reply: "We will discount for you with "pleasure, taking your government bonds at par as col- "lateral." In accordance with this arrangement, but not until a month after the permission for overdrafts, above referred to, was given, the note for $12,000 was discounted.

The court will observe, that at the time this discount was made upon the security of these bonds at par, nothing was said about the correspondence of November 24th constituting a further lien, either actual or possible. Did the defendants in error, on the 21st of December, make an overdraft of over five thousand dollars, expecting it to be taken care of by the Chicago bank on the security of these bonds; (Print. Rec., 25); and on the next day, without a word of explanation, procure the discount of twelve thousand dollars upon the same security, the security being worth only a little over thirteen thousand dollars?

(*b.*) The plaintiffs in error were careful, when the custody of the bonds was changed from that of special deposit to collateral security, to specifically advise the defendants of that fact. (Print. Rec., 24.) But on no one of the seven occasions, when the account of the defendants in error was overdrawn upon the books of the plaintiffs in error, was there any such letter of advice.

(*c.*) Why should the defendants in error, if there was any such continuing agreement, write the Chicago bank, upon the extinction of the $12,000 debt, to "hold the "bonds, as formerly, for our use?" Why should the plaintiffs in error, in the face of such continuing understanding, advise defendants in error, as they did on the 5th of May, 1881, that the bonds were held as a *special deposit*. (Print. Rec., 24.)

This correspondence of April and May, 1881, is wholly inconsistent with the theory of a then existing agreement that the bonds were to remain in custody as collateral security for future overdrafts.

Sympathy for the defendants in error in their loss, naturally leads us, perhaps, to find some theory upon which to extend the measure of plaintiff in error's liability; although why it should, is not perceived, when we recall their own loss in connection with this theft. Lest it should, however, permit me to lay aside the circumstances of this case and assume another, raising the same question of fact. Suppose that instead of bonds, the collateral in question was negotiable paper, and the plaintiffs in error, coming into possession before maturity, under precisely the circumstances of this case, were asserting an agreement, like the one claimed, to cut off the equities of the makers; would such claim, on the facts here proven, be allowed?

Colebrooke on Collateral Securities, Par. 17, and cases therein cited.

If the facts would not support such an agreement in the assumed case, why should they in any case?

Did the plaintiffs in error exercise toward these bonds the same care bestowed upon their own property of like character, and the care which persons of common prudence usually bestow upon their own property, under like circumstances?

It is admitted that these bonds were lost by the theft of Frederick M. Ker. It is equally conclusive that the plaintiffs in error, before denying Ker access to the vaults, had unquestioning confidence in his integrity and trustworthiness. This is shown by the fact, that during this whole period, Ker had within his reach the cash reserves and collateral securities belonging to the bank, as well as the special deposits. At the outset, therefore, the plaintiffs in error stand acquitted of retaining Ker after they had, in point of fact, begun to question his integrity.

This does, and ought to, furnish a very strong presumption against the charge of negligence. In some of the states, as shown by the authorities cited, it would be sufficient to discharge them from liability as bailees without reward. When it is remembered that these men stood among the foremost bankers of their day and city: that in a business, dependent for success upon unceasing care and correct business methods, they had achieved a splendid success; and that this one known loss by crime was pursued by them, with unflagging energy, from one continent to another, until its perpetrator was punished; the presumption ought, in all the courts, to be almost conclusive.

No business of any magnitude can be conducted without reposing confidence in some individual. The extent of this confidence necessarily increases with the magnitude of the business. No system of book-keeping has yet been discovered, that can bring under the eye of any

one man, a practical supervision, or cotemporaneous knowledge even, of all the transactions daily going through our great banks. No system of checks or monitors has yet been devised, whereby the intentional misdoings of a trusted associate is, without prolonged investigation, made known to the others. A great business, however well classified and made to run through interdependent or parallel routine, rests, at last, upon one or more points of personal confidence.

Ker's criminal abuse of his employer's confidence is no negligence of theirs. Painful as it is, it has brought them no nearer to immunity from this class of crime. Another employe now holds his place, and possesses his opportunities. These are points of danger that cannot be escaped.

The finding of facts discloses nothing in Ker's life, prior to about January, 1882, that has, by our adversaries, been made the subject of criticism. A young man of no known bad habits, he rose, by degrees, along the line of the bank's promotions. His rising was not rapid; it occupied ten years of the bank's history. His final promotion was not based, simply, upon good address, influential recommendation, or personal partiality resulting from consanguinity or social contact, but was the result, evidently, of apparent merit. He could congratulate himself upon having thus deservedly worked into his employers' confidence, and they could reasonably assure themselves, that a promotion thus obtained, would not be lightly thrown away.

Confidence thus slowly established is the most impregnable against attack. No right-minded man is quick to mistrust the integrity of his oldest approved business associate. It was with this confidence, and this feeling to-

ward Ker, that Kean, about a year before his flight, charged him with speculating. Kean had no definite knowledge that any speculation, in fact, had been engaged in, but in view of his information employed this method of making inquiry. Ker replied with apparent frankness and honesty. He had, in the past, he said, made a few transactions, but he was not engaged in it then, and would not be again in the future. He realized, he said, that such transactions, under the circumstance of his employment, were wrong, and it would not thereafter be repeated. As an assurance that it had not cost him any pecuniary loss, he stated that, all told, his profits were about one thousand dollars.

We know how this apparently honest disclosure and promise affected Kean's faith in his associate. That faith was not touched. He believed that Ker had told the truth, and that his almost single experience on the board of trade would be his last. This belief in his integrity kept open to Ker the reserve fund of the bank and its deposits.

Is the court prepared to say, that in thus believing, Kean acted differently from persons of common prudence, on like occasions? Had Ker been, on this occasion, *presenting* himself for a place of confidence, and in a course of inquiry disclosed this transaction, a person of common prudence might, possibly, have denied his application. In such an instance there would be no assurance, through previous acquaintance, that the whole truth was known, and that the desire for money it bespoke was not seeking gratification in other practices. But the man, with whom Kean was conversing, was no new applicant of unknown character, or of untried faithfulness. He was a tried associate, whose word he had accepted on a thousand occasions during the past ten years. We can prob-

ably best test Kean's situation by looking into the circle of our own business associates. In every one of these circles there will be found one man, at least, whose word we are willing to accept, without a critical or prolonged investigation into collateral evidences of its truth. Ker stood to Kean, as that associate stands to each of us.

Thus believing him, ought Kean, notwithstanding, to have discharged or disgraced him? Not unless a few transactions on the board, closed up and repented of, unfits a person, *forever thereafter*, from holding a position of confidence and trust. From what field then, will the employes and trustees of the future be gathered? Senators, judges, lawyers, physicians, businessmen, and ministers of the Gospel, have seen their supposed opportunity and made their venture. Some have not repeated it, for the same reason that a child does not the second time put its finger in the fire: some have, after a little experience, been drawn off by more absorbing interests: some have by a few experiences, not attended with loss, learned the foolishness of its boasted chances, and deliberately retired; a few, *comparatively* are at it yet. Is the great multitude, who after a mere initiation, turn their backs upon the hollow business, to be held, forever thereafter, as tainted men—ineligible to any station of trust? Do the few, who in the face of loss, keep on, until the point of crime is reached, do the double injury of abusing their own confidence, and, also, the confidence of the world in everybody else? Kean, in looking for a successer to Ker, might have found it difficult to find one who had never had a transaction, unless he accepted the new candidate's word for that fact. Why would it be less negligent to accept the new man's word, than to take that of the tried man?

But Kean had no way of testing Ker's veracity. What method was there left open, whereby to ascertain if Ker was, notwithstanding his statement, still engaged in speculation. A visit to all the commission houses doing business on the board, and to the bucket-shops doing business off the board, with such delays as would attend an inspection of the books, had an inspection been accorded, would have occupied months of time. But an inspection of the books would not have been accorded; neither would it have done any good if it had. The men who run these bucketshops, and some of those who take this line of business on the board, never record the names of their customers. They are careful, not to so much as know them. It saves them inconvenient intrusions, and often still more inconvenient consequences. Ker was sworn against the plaintiffs in error on this trial. He knows where this money was dropped, and he bitterly hates his prosecutors. Why was not the Circuit Judge able to find just where, and with whom, these transactions took place. Ought Kean to be held to a greater measure of success in inquiry, than the court possessed?

But before the failure to investigate Ker's statement is imputed to Kean, as an act of negligence, it ought to appear, affimatively, that such investigation would have afforded Kean some light not otherwise possessed. In the absence of facts, the inference is, at least, as reasonable, that it would not as that it would; and in the language of Justice WELLS, in *Smith* v. *Bank*, *supra*. "When the "evidence tends equally to sustain either of two incon- "sistent propositions, neither can be said to have been "established by the legitimate proof. A verdict in favor "of the party bound to maintain one of these propositions "against the other is necessarily wrong."

It is not, in fact, found that Ker, was at that time, or for months thereafter, engaged in speculation. It is more than probable that his guilty conscience, quickened by Kean's inquiry would cause him to desist for a time. It cannot be reasonably inferred, therefore, that had Kean attempted to investigate, or had gone to the grotesque extent of shadowing his cashier with a detective, such expedient would have resulted in any knowledge.

It is urged that Kean ought, immediately after this conversation, to have caused an examination into the books, securities, and special deposits of the bank. The examination into the special deposits would have availed nothing, for there was no record by which they could be tested. The examination into the collateral securities would have availed nothing, for none of these were stolen. And an examination into the books, to ascertain if any cash had been abstracted, was not the work of a day, or of a single expert. Ker was no common thief. He had so successfully manipulated these books, through the use of names of fictitious customers, that when, in November, 1882, an examination was started, two whole months failed to disclose a clue or circumstance casting suspicion upon his honesty. It was, in the end, only through a key furnished by himself, after his flight, that the warp and woof of these manipulations were successfully unraveled.

But this contention simply brings us back to the first inquiry, viz: whether Ker's statement ought to have aroused in Kean a serious distrust of his integrity. The same reason that would induce a prolonged and thorough overhauling of the books, to ascertain if there had been theft, would have justified Ker's suspension or discharge. It is idle to hold Kean guilty of negligence, in not pursuing some specified course, until the court has first found,

that in accepting the assurance of his old and tried associate, he was indulging an over-confidence to an extent that was culpable.

The insistance that a record of these bonds ought to have been kept, is open precisely to the same objection. The bonds were not in danger of loss, except at the hands of one or two employes upon whom the confidence of the bank in these, and all other concerns, *necessarily* rested. They were safe, as long as these servants were honest. They became unsafe only, as did, also, the property of the bank, only when the servants became dishonest. Moral depravity, not defective book-keeping, was at the bottom of the loss.

There is no fact in the finding which shows that the keeping of such records would have deterred Ker from stealing the bonds. Could he not have as easily manipulated and falsified such record, as he did the other books of the bank, whereby his stealing of cash was successfully concealed?

Neither did the custom of examining the cash and collateral, once a month, and the special deposits but twice a year, have anything to do with Ker's choice of a field for operations. The monthly counting of the cash did not secure it against his depredations. He was safe, notwithstanding such count, as long as the falsified books were the standard of comparison. He would, likewise, have been secure against detection in converting the bonds, even though a record were kept, and a monthly examination had, as long as the manipulation of such record lay within his power. He knew, from the correspondence, that these bonds were not likely to be called for, and that in such event it would be by letter, thus giving him

notice, and he therefore made them, and the bank's cash, the subjects of his ventures.

The record and monthly examination into the collateral securities had little to do with their exemption from his peculations. It was the fact that such securities mature at short intervals, and are likely to be called for at any moment, that made them seem to be inhospitable ground for his visitation. Records and examinations *within* the bank did not alarm him. He was, himself, one of the examiners, and was not a suspect to be examined against. But the certainty that collateral, in the very nature of banking, would be called for shortly, and detection follow, led him to avoid that field.

To take the collateral would have been as foolish as to forge a short time paper—its quick detection was certain. To steal the cash and the bonds was not so sure of detection, for a turn of luck might enable him to replace them, and, at any rate, their discovery was an indefinite time ahead. These were doubtless the considerations that guided his fingers.

Is there any better guide to a knowledge of "common prudence," than what common prudence does? If the keeping of such a record is a precaution which bankers of common prudence adopt, nothing was easier than to have shown such fact. The burden of proving it, as all other facts constituting negligence, was upon the defendants in error. The silence of the finding upon that point shows that no such custom was proven, although a hundred bankers were within a few minutes call of the court room.

It is not easy to understand how negligence can be predicated upon the notice brought to Kean in Novem-

ber, 1882. Notwithstanding Ker's explanation and denial, his access to the treasury was thereupon immediately denied him. (Printed Rec., 26.) All the bonds had already been stolen, and had, according to the finding of facts, already been used for margins upon the board. No injury was done the defendants in error after this notice, unless Kean's inability to examine the special deposit, on account of the want of a record, prevented them from recovering the bonds. How would discovery through a record, or otherwise, have brought about their recovery? A discovery was made only two months later, and Ker captured and brought back for trial, but the bonds were not forthcoming. How is it shown that a discovery two months earlier would have resulted differently? Ker himself could not have recovered them. They went with his losses, and he certainly would not have made even an effort to recover them, unless the plaintiffs in error had compromised his crime. There is no fact in the finding tending to show that the discovery of his crime, or the capture of Ker, in November, instead of January, would have changed the measure of the loss.

The plaintiffs in error ought not to have been held liable for the loss of these bonds, unless the acts or omissions, constituting the alleged negligence, were, *in fact*, the proximate cause of the loss. The time of the actual taking of these bonds is not fixed. Their theft occurred *sometime* between November, 1881, and November, 1882. There is no finding, however, that they occurred at intervals along the whole line of this period. From the facts found it does not appear, but what these bonds were all stolen in the early portion of this period. Now, no act of negligence imputed to Kean, occurred before January, 1882, some months after

this period had begun to run. Upon what finding, then, can a court determine, whether the bonds were stolen *before* or *after* this first act of imputed negligence. And, until that is determined, can the court adjudge that the imputed negligence was the proximate cause of the loss? For all that appears, the alleged effect preceded, in point of time, the cause.

This is, I admit, a hard case upon the defendants in error, who had confided their property to a place of supposed security. "But" in the language of Judge PARKER, in *Foster* v. *Essex Bank*, "it is not less hard upon the "members of the corporation who have, by the same "wicked conduct, been deprived of their earnings and "savings. All that can be done by this court is to lament "the common misfortune, and take care not to add in- "justice to hardship, by relieving one sufferer at the ex- "pense of others, unless the principles of law demand such "interposition."

Respectfully submitted.

P. S. GROSSCUP,
Counsel for Samuel A. Kean.

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IN THE

Supreme Court of the United States.

No. 115.

DAVID PRESTON, SAMUEL A. KEAN,
AND ELISHA GRAY,
Plaintiffs in Error,

vs.

JAMES B. PRATHER
AND THEODORE L. ROBINSON,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument for Plaintiff in Error,

Elisha Gray.

W. P. FENNELL,
M. D. BRAINARD,
Attorneys for Elisha Gray.

WASHINGTON, D. C.:
J. S. TOMLINSON, PRINTER.
1890.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

DAVID PRESTON, SAMUEL A. KEAN, et al.,
Plaintiffs in Error,
vs.
JAS. B. PRATHER, et al., Defendants in Error.
No. 115.

Plaintiffs in error were bankers in the city of Chicago. They held, as a special deposit, certain bonds belonging to the defendants in error. These bonds were kept in an envelope with the name of the owner written thereon, and placed in the treasury of the bank where their reserved fund was kept. It was not the custom of the bank to keep a record of special deposits.

Some time between November, 1881, and November, 1882, these bonds were stolen by one Kerr, a clerk in the employ of the bank. Besides the bonds belonging to the defendants in error, Kerr took about $21,500 of the bank's money and other valuables. Kerr fled in January, 1883, was pursued at great expense, brought back from South America, and prosecuted to conviction for the larceny, and sentenced to the penitentiary. Appellants discovered the larceny and defalcation after his departure. Plaintiffs in error were mere depositees or bailees without hire. Kerr had been in their employ many years; had always borne a good character; came to them from the Bank of Toronto, highly recommended; stood well in church and state; had the entire confidence of his employers; had access to their money and other valuables as well as the special deposits.

Some time in January, 1882, plaintiffs in error heard that one of their clerks had speculated on the Board of Trade; had no definite information as to which one. An investigation was immediately made. Kerr said he had speculated a few times in a small way, but promised not to do it again. There was no charge or suspicion that he had speculated with bank funds, or that he had done anything dishonest or fraudulent. He was a man of good habits; was never seen at the gaming table, or in any disreputable places. He was an unmarried man, earning a good salary, two thousand dollars a year, and had made a few deals on the Board of Trade with his own money, and promised not to do it again.

Were plaintiffs in error guilty of gross negligence in not discharging one whom they believed to be a faithful clerk and a man of integrity, under such circumstances, especially in those days when it was much more common than now for reputable business men of good character to do more or less speculating in that way?

Afterwards, a short time before Kerr's flight to Canada, one of the members of the firm received an anonymous communication stating that some one connected with the bank was speculating on the Board. No name was mentioned. Now what was done? Did the bank treat this information lightly? Immediately upon receipt of this letter David Preston addressed the following communication to S. A. Kean, the partner residing in Chicago:

DETROIT, *Nov.* 10, 1882, 4 P. M.

S. A. KEAN, Esq.

DEAR AXTEL:

I hand you herewith a quotation from a letter written November 3d, but not handed to me until this hour, indicating that some one of the employees is operating on the Board of Trade. Have a consultation to-morrow on the subject with Wills, Ware, Blennerhasset, and any others of the bank you may think best.

This letter was handed to me by a prominent and reliable business man of this city. After the consultation see the par-

ties, and get a full statement of all the facts. Have a careful inventory of all the bonds and cash at once, including all the collaterals. Mr. Bercry, my cashier, will be gone until the 20th, and until he returns I cannot leave home. Take prompt and judicious action in the matter.

Yours truly,

DAVID PRESTON.

The investigation suggested by Mr. Preston's letter was immediately commenced and exhaustively prosecuted. Kerr was again examined as to his speculations; he denied the charge. He admitted that he had invested some funds through brokers, belonging to friends of his in Canada, at their request, but had not broken his promise previously made that he would not speculate on his own account. He was again cautioned that it was not prudent for a bank clerk to do anything that had even the appearance of speculating, even if there was nothing wrong attached to it, and promised that he would not do even that much again. The information received by the bank was from an anonymous source. Mr. Kean believed Kerr; thought he was thoroughly honest, and had no evidence whatever to the contrary. Whether he might have discovered that evidence or not by having an expert examine Kerr's accounts, is a matter of which defendants in error cannot complain. Their loss was not occasioned by any erroneous entries in the books. The bank was under no obligation to defendants in error in this regard. Kerr's larceny of the bonds was a felonious act outside of, and having no connection with, his official duties. Upon this point, in the case of Scott and Brother *vs.* The National Bank of Chester Valley, 72 Pa., 479, the Court say: "But it turned out that after the teller absconded, his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years to an amount of about $26,000. It was contended that the want of a discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable. The Court negatived this

position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose, not from the accounts as kept by him, but from a larceny, a transaction outside of his employment. We perceive no error in this."

Besides, Kerr did not steal the bonds after the receipt of this letter; he had already stolen them; consequently, neglecting to discharge him *then* did not occasion the loss of the bonds.

The negligence constituting the ground of liability must be such as enters into the cause of loss, but the false entries in the books, and the want of their discovery, were not the cause of the bailor's loss, and not connected with it. True, the same person was guilty of both offenses, but the acts were unconnected and independent.

True, the bank did not discover in time the injury he did do, but the very fact that it did not discover his false entries and his peculations, repels the knowledge of his dishonesty. The neglect might have led to responsibility to those with whom they had dealings if they suffered from that neglect, but this neglect to examine into his accounts was not the cause of the bailor's loss. His loss was owing to the immediate act of dishonesty of the teller, and not to his purloining the funds or falsifying the accounts of the bank. (Foster *vs.* Essex Bank, 17 Mass., 507.)

The argument of the plaintiff results simply in this, that mistaken confidence is a ground of liability, but if this were the rule, business would stand still, for, without a common degree of confidence in agents and officers, much of the business of the world must cease. But the testimony shows that every precaution was taken to discover any crookedness in the accounts, if any existed, and the only reason it was not discovered was tersely stated by Mr. William Preston:

"Q. Why was this discrepancy of ten thousand dollars not discovered when the first checking was done?"

"A. Because the man that we trusted to check it up and find it out was the thief."

The case of Scott and Brothers *vs.* The National Bank of

Chester Valley is almost identical in every respect with the present case, with a few points of difference in our favor. First, the Chester Valley Bank was a small concern, and its affairs could be easily investigated, whereas, Preston, Kean & Company being one of the largest and oldest banks of the west, with its multifarious business, requiring a large force to conduct it, thus making it necessary to repose confidence in a larger number of employees, and proportionately increasing the risk incurred.

Second, the defaulting clerk in the Chester Valley Bank was a married man, who had to support a family on a salary of eight hundred dollars a year, and less, and having no other means or source of income, he could not by any possibility have been able to do any speculating with his own funds. Whereas, Kerr was an unmarried man, earning a salary of two thousand dollars a year, and could, if he so desired, risk a thousand dollars a year of his own money in speculation, without encroaching too closely upon his means of support, or laying himself liable to any charge of dishonesty. We do not mean to justify, inferentially, a habit of speculation by an employee of the bank. We merely state that he might have done so without being guilty of a fraudulent act, and make the point that nothing less than a fraudulent act, and a knowledge thereof having been brought to the plaintiffs in error, would make them liable to the defendants in this case. There is not a scintilla of evidence that they possessed such knowledge. In fact, as the Court say, the fact that they lost their own money is itself sufficient proof that they did not possess such knowledge.

The case of Scott and Brother *vs.* The Bank of Chester Valley was an action on the case brought in 1872 in the Court of Common Pleas of Chester County, Pa., by John Scott, Junior, and Amos Scott, trading as Scott and Brother, against the National Bank of Chester Valley, to recover the value of four government bonds, each of one thousand dollars, which had been placed by the plaintiffs with the bank for safe keeping, and which had been stolen by John S. Martin, a clerk or teller

of the bank. The plaintiffs were store-keepers in the neighborhood, and had kept an account with the bank from its organization many years before. They were in the habit of depositing their government bonds with the bank for safe keeping. Prior to October, 1872, they had deposited with the bank bonds to the amount of seven thousand dollars. Martin absconded, being in default to the bank to the extent of about $26,000. It was afterwards ascertained that the bonds in question had been stolen by Martin. The securities of depositors were kept with the same care and in the same manner as the securities and bank notes of the bank and the individul securities of the President and Cashier. The packages were delivered to the depositor by whatsoever officer of the bank was asked for them. All the officers of the bank had access to the vault and the safe. The bank kept no record of the securities. By opening one of Martin's letters by mistake, the President and Cashier ascertained early in 1871 that Martin had been dealing in stocks. The brokers promised to notify the bank if he dealt with them again, which promise they failed to keep. Nothing was said to Martin on the subject, and no other precaution was taken, and nothing further was done until after Martin had absconded with the stolen bonds. Upon this state of facts the trial court charged as follows:

"The depositee is responsible only for gross negligence. It is perhaps pretty clear that the defendant's officers took the same care of the plaintiffs' bonds that they did of the money of the bank, and of their own private bonds and property. Both were deposited in the same place, and left under the control of the same clerks or agents. These bonds were not taken by outside force, but were abstracted by one of the banks clerks; carried off feloniously by him. Was he a man who, from his known character, would be intrusted in a bank by persons of ordinary prudence?

"You have heard the statement of numerous witnesses as to the general character of this young man; all speak of him in the highest terms. He appears to have had the confidence of the entire community, as well as that of the bank officers; stood well in church and state; was made the treasurer of one of the

churches and of the gas company; nothing was known or said against him so far as we can gather from the witnesses. Was it gross carelessness to trust him?

"It is said, however, that more than a year before his delinquency became public, the cashier and president both knew that he had been dealing in stocks, and this in itself should have put those officers on their guard. You have heard the statement of both of these gentlemen, and from that it appears that when they accidentally discovered that he had so dealt on one occasion, they at once inquired of the broker in Philadelphia, and were informed that he had made one small purchase; had done well in it; and the broker, in whom the officers had confidence, promised that if he dealt further they should be informed.

"They never heard of any other dealing until the clerk had greatly defrauded the bank, committed the larceny of these bonds, and had absconded. Were the officers guilty of imprudence in retaining the clerk under the circumstances?

"Is a single purchase and sale of stocks such evidence of moral delinquency as would call for the immediate discharge of a valuable clerk of good general character?

"It strikes us that it would be judging harshly of an act done daily in the cities, and business followed by men generally esteemed respectable. Had he been found at the gaming table, or engaged in some fraudulent or dishonest practices, he should not be continued in a place of trust.

"These officers seem to have acted with reasonable care and prudence in taking the step they did to prevent a repetition of that kind of speculation. The verdict was for the defendants."

The cause was removed to the Supreme Court by writ of error.

"Another complaint is, that the teller was suffered to remain in employment after it was known that he had dealt once or twice in stocks. Undoubtedly the purchase or sale of stocks is not, ipso facto, the evidence of dishonesty, but, as the judge well said, had he been found at the gaming table, or engaged in

some fraudulent or dishonest practices, he should not be continued in a place of trust. So if the president of the bank, when he called on the brokers who acted for the teller in the purchase of the stock, had discovered that he was engaged in stock gambling, or in buying and selling beyond his means. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed."

For the purpose of changing the rule of law as to the degree of negligence requisite to fix the liability of the plaintiffs in error for the loss which occurred to the defendants from the larceny of its clerk, strenuous efforts were made at the trial in the court below to show that the bank held these bonds as collateral security for an alleged indebtedness of the defendants to the bank. The proof utterly negatives this proposition. It is undeniable that the bonds in question were received as a special deposit, and only once during their possession by the bank was the character of the deposit in this respect changed, and that by special arrangement. The loan which was obtained on the security of the bonds was fully discharged long before the bonds were stolen. The fact that the bonds remained in the same place shows that they were kept with the same degree of care when held as a special deposit as when held as a collateral. The letters of the defendant in error inquiring, if the occasion occurred, whether they might obtain an advance on the security of the bonds on the particular occasion described; in their application negatives the idea that it was a mutual understanding that those bonds should stand as security for advances that might be made from time to time. The exception proves the rule. The proposition that the bank would have had a right to retain these bonds in the event of the defendants overdrawing their account, does not convert them into collateral security by any means, even if admitted, because if they had any such right, it would be in the nature of a set-off.

Let us suppose that the defendants in error had demanded the bonds of plaintiffs in error while their account was overdrawn, and that the plaintiffs in error declined to deliver the

bonds. If the defendant in error had brought suit for the recovery of the value of the bonds, plaintiffs in error might have set off any balance due them from defendant in error against this claim, but if under these circumstances defendant in error had brought replevin for the recovery of the possession of the bonds, they would undoubtedly have a right to recover under such circumstances. This illustrates very clearly the character of the deposit. Even if the defendant in error left these bonds in the hands of Preston, Kean & Company for the avowed purpose of obtaining advances upon them from time to time if the exigencies of the business repuired it, they would not become collateral to such advances until the advance had been obtained upon such securities. The purpose or intention of the defendant in error in leaving the bonds on deposit does not fix the liability of plaintiffs in error. Defendants in error vainly attempted to show that their accounts were overdrawn to a large extent at the time the bonds were stolen, by introducing their own books for that purpose. Every one who has ever kept a bank account knows that the books of the depositor are absolutely no evidence whatever as to whether his account at the bank is overdrawn or not. A depositor might draw a hundred checks upon the bank without having a cent of money there, send them out all over the country, credit them up to the bank, and thus show by his own books that his account was largely overdrawn. Whereas, as a matter of fact, when these checks were presented to the bank, there might have been ample funds to meet them deposited in the meantime, or payment might be refused for want of funds. In either case there would be no overdraft in fact, notwithstanding there would be an apparent overdraft shown on defendants' books. The books of the plaintiffs in error are the only evidence as to whether defendants' account was overdrawn or not, and from them it appears that there was no overdraft in fact when the bonds were stolen, between November, 1881, and November, 1882. We do not wish to be understood as admitting by inference that, if the bonds had been held as collaterals, the plaintiffs in

error would be liable under the circumstances of this case. The plaintiffs in error were guilty of no negligence, in the custody of defendants' bonds, and hence would not be liable for their loss by felonious acts, even if the bonds had been held as collateral security.

Respectfully submitted,

W. P. FENNELL,

M. D. BRAINARD,

Attorneys for Plaintiff in Error, Elisha Gray.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1890.

DAVID PRESTON, SAMUEL A. KEAN AND ELISHA GRAY,
Plaintiffs in Error,

vs.

JAMES B. PRATHER AND THEODORE L. ROBINSON,
Defendants in Error.

Error to the Circuit Court of the United States, Northern District of Illinois.

No. 115.

Brief and Argument for the Defendants in Error.

ROBERT HERVEY,
of Counsel for Defendants in Error.

CHICAGO, ILL.
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Error to the Circuit Court of the United States Northern District of Illinois.

No. 115.

Brief and Argument for the Defendants in Error,

BY ROBERT HERVEY, OF COUNSEL.

This was an action on the case brought by the defendants in error against the plaintiffs in error in the Circuit Court. The cause was submitted for trial to Mr. Justice Gresham without a jury, who found the defendants (below) liable and rendered a judgment against them for $17,913.58 and costs of suit.

To reverse which judgment the defendants below took a writ of error, and the cause is now before this honorable court for review.

STATEMENT OF THE CASE AND ARGUMENT THEREON.

The facts in the case are few and simple; about most of them there is hardly any controversy, and on those facts as conceded or proved, the court will have to deal with the controversy as a question of law.

The defendants in error, Samuel Prather and Theodore L. Robinson, co-partners, doing a banking business at Maryville, Nodaway county, Missouri, under the style and firm of The Nodaway Valley Bank, had for many years been business correspondents of the plaintiffs in error, David Preston, Samuel A. Kean and Elisha Gray, a banking house doing a general banking business in Chicago under the firm name of Preston, Kean & Co. Transactions of a large financial character commenced between these parties in 1873 and continued until the summer of 1883, when they ceased on account of the occurrence out of which the present action arises.

On the *7th of July, 1880, the plaintiffs in error sold to the defendants in error*, $12,000 of United States 4 per cent. government bonds, which cost the defendants in error with the premium and accrued interest, according to the statement rendered by the plaintiffs in error to the defendants in error at the time of the purchase, $13,005. The plaintiffs in error themselves sold these bonds to the defendants in error and furnished the defendants in error (in a letter advising the sale) with the numbers and letters distinguishing these bonds so sold, and the proof shows that the plaintiffs in error had at the time of the sale the

number of these bonds in what was called their "bond register," in which they recorded the particulars of all bonds which they owned.

These bonds were not at the time of the purchase, nor at any time thereafter, in the possession of the defendants in error; they never saw them, but they remained in the hands of the plaintiffs in error and were retained by them to be used as collateral security for any loans or advances from the plaintiffs in error to the defendants in error, as the business of the defendants in error might from time to time require.

The account between the plaintiffs in error and the defendants in error was a large and profitable one to the plaintiffs in error, aggregating, as shown by the statements of the plaintiffs in error, the following large sums in the following years:

1880	$361,977.06
1881	434,258.27
1882	294,341.73
1883 (to close of transactions)	93,078.82
Aggregating in 3 y'rs the sum of	$1,183,655.88

Of these large deposits the defendants had at all times the use of a balance of $3,000 *without interest*, and on the excess interest was allowed at the rate of 2½ per cent. per annum.

This of course was a very advantageous arrangement for the plaintiffs in error, getting the use of large sums of the defendants in error's money at a very low rate of interest, whereas, when the defendants in error required loans on the security of these bonds as collaterals or upon other collaterals, the defendants charged the plaintiffs 6 per cent. per annum on all of these loans. The average

monthly balances can easily be arrived at from the plaintiffs in error's statements. All of which facts were in evidence before the Circuit Court.

From the time of the purchase of these $12,000 of bonds from the plaintiffs in error by the defendants in error they seemed to have remained on the hands of the plaintiffs in error to be held and used as collateral security for any indebtedness of the defendants in error to the plaintiffs in error as occasion may require, and such had been the course of dealing between the parties previously to the purchase of the bonds in question for several years. The defendants in error having had other bonds previously to the purchase of those in question in the hands of the plaintiffs in error which were held and used as collateral security for loans and advances from time to time, as the defendants in error required them.

Thus a course of dealing had been established by the acts of the parties from the time of the commencement of their business transactions, which appears to have been continued unchanged subsequently to the purchase of the bonds in question.

From the time of the purchase the bonds in question were left in custody of the plaintiffs in error with the well understood arrangement that they were to be used in any exigency as collateral security, and for that purpose, and for that alone, were they permitted to remain in the custody and under the control of the plaintiffs in error. I think this is the only rational conclusion to be deduced from the evidence, and not that defendants in error had invested the large sum in money which the bonds cost and had left them for years in the possession of the PLAINTIFFS IN ERROR AS GRATUITOUS BAILEES, and for safe keeping only. It is conceivable that men in the business in which de-

fendants in error were engaged, viz., bankers, and whose business necessities might at any time require the use of all their available means should tie up indefinitely so large a portion of their active capital as $13,000 and permit it to lie dead and useless in the hands of the plaintiffs in error as a *special deposit*, or in other words as *gratuitous bailees?* Business men of ordinary capacity do not act so unwisely.

The statement of the proposition is its own refutation. I therefore respectfully submit that the only reasonable inference to be fairly drawn from the evidence is that both parties well understood the nature and character of the deposit, and that it remained in the hands of the plaintiffs in error as a collateral security, to be used as such whenever required, and not that $13,005 had been invested by the defendants in error, on July, 1889, in the purchase of securities which they did not contemplate to use in their business, but left in the hands of the defendants for no earthly purpose, so far as appears, because the defendants in error, under these circumstances, might as well, and better, have taken their bonds into their own possession, where they could at all times have been subject to their personal supervision and control, and upon which they themselves could (as well as the plaintiffs in error) have collected the interest coupons as they matured.

I assume, therefore, that the evidence establishes that the plaintiffs in error were not merely gratuitous bailees of those bonds, but that the relations between the parties in business, and the use which it was all along contemplated should be made of them, and was made of them, constituted the plaintiffs in error as bailees for hire, or at all events responsible in any event to the defendants in error

for the exercise of at least ordinary care—care of a higher degree than that required by law of a mere gratuitous bailee.

In support of this view it appears from the evidence that in the month of November following the purchase of the bonds in question, the defendants in error applied to the plaintiffs in error to discount their (the defendants in error) note for $12,000, on the pledge of the bonds in question as collateral security, and that such loan was made by the plaintiffs in error to the defendants in error on such security; that the note was subsequently renewed for a short period on the same security, when it was paid, cancelled and returned to the defendants in error, and in the letter returning it, plaintiffs in error inquired, "What shall we *do with the collaterals?*" recognizing that they, the bonds, had been regarded and used in that character.

To this inquiry defendants in error replied in substance, "*Hold the bonds as before;*" that is, hold them as collaterals to any indebtedness of our firm to you, either by loans or discounts, or advances of money in the way of overdrafts, should such be required.

Requests were made from time to time by the defendants in error on the plaintiffs in error for permission to overdraw on these bonds as collaterals, and in all instances permission was given as requested. That appears to have been the ordinary course of dealing, and so late as November, 1882, when certain overdrafts were made, as the plaintiffs in error's statement showed. It seems, therefore, to me clearly established by the evidence that such had been the invariable course of dealing, and that even when the defendants in error requested an advance on other collaterals, as was the case at a subsequent

period, reference was always had to reserving the bonds for an "emergency," such as the necessity which might arise to make overdrafts for use in the defendants in error's banking business, which the plaintiffs in error were informed of, and apparently well understood, because they without hesitation made the loan asked for on the security offered and given, viz., notes of the customers of the defendants in error's bank. Such collaterals being offered to the plaintiffs in error for the reason given—that the defendants in error desired to reserve the bonds for use as collaterals in case of "emergency."

If, therefore, these were the relations of the parties with regard to the holding by the defendants of the bonds in question, it appears to me that, beyond doubt or cavil, the defendants in error were, under the evidence, certainly entitled to recover. The authorities cited by my associate, Mr. H. W. Jackson, clearly establish that if the bonds were held as collateral the plaintiffs in error did not occupy the position of *gratuitous bailees*. This being so, what was the duty of the plaintiffs in error to the defendants in error as custodians of these securities? Under the law, certainly, *at least* to take such care of them as a reasonably cautious and prudent man would take of his own property. Not to take such care as they might have taken of their own property, because they might have been negligent of their own, and would, therefore, be clearly liable to the defendants in error. The duty imposed on the plaintiffs in error by law was that stated, viz., *to take such care* of the property of the defendants in error as a reasonably prudent and cautious man would take of his own.

It can scarcely be successfully contended, under the evidence in this case, that the plaintiffs in error have come

anywhere near this legal requirement. They did not know for nearly eighteen months before the discovery of the alleged theft, as Mr. Kean testified on the trial, that the bonds of the defendants in error were in their possession at all. No examination was made of them, although periodical examinations were made at brief intervals into the condition of their own monies and securities. Even when the new safe was put in in November, 1882, and the contents of the "treasury" were transferred to it and access to it by the witness, Ker, was cut off, no examination appears to have been made to discover whether the so-called "special deposits" were there or not. What sort of care was this? Was it such as an ordinarily prudent and cautious man would take of his own property? I hardly think that it can be properly contended that it was—no prudent and cautious man would so act.

But supposing it should be held by the court that the evidence showed that the bonds of the defendants in error were held by the plaintiffs in error simply on *special deposit*, or, in other words, that their relation to the defendants in error was that of *gratuitous bailees*—a result which I scarcely think the evidence could have warranted the court below in reaching—*and which it did not reach*—then what would be the duty imposed by law on the plaintiffs in error? They would be answerable for gross carelessness; of this there cannot be the slightest doubt. Now, does not the proof show that they were grossly negligent, beyond all question?

They made no examination for a very long period of time to ascertain whether valuable property entrusted to them for safe keeping (and of a character to be readily abstracted and converted by a thief), and transferable by delivery—being government bonds payable to bearer—

was in their custody at all. The negligence with which a defendant can be charged must of necessity be to a great extent measured by the character of the property of which he had been constituted the custodian.

From the fall of 1881 until the discovery of the crime of Ker the defendants appear to have been entirely regardless of any sort of precaution *tending* towards the safety of this valuable property.

Some time early in 1882 certainly, and perhaps sooner, it came to their knowledge that Ker had been gambling on the board of trade. He was inquired of and acknowledged it, and told a story which was certainly untrue about the extent of his operations and their result. Ker says, in his testimony, on three occasions, Kean in his testimony says certainly on two. What, then, became the absolute duty of persons like the plaintiffs in error entrusted with the custody of valuable property belonging to others, *of the kind in question*, to which this gambler had unobstructed access: First, to ascertain by a careful examination whether the property was *there*; and if they found it was, to place it beyond the subsequent reach of an employe confessedly engaged in so hazardous a business. Next, to make peremptory demand on Ker for the fullest information as to the nature and extent of his gambling transactions, and if refused, instantly to discharge him from their employment. He was a dangerous man to retain in his position under any circumstances.

If they got the full and complete information from Ker as to the extent and character of his gambling transactions and the names of all the parties through whom his gambling operations were carried on, then the most rigid inquiry should have been made into those transactions.

How he dealt, what securities he put up for his margins on his purchases, and generally the matter of these operations should have been probed to the bottom.

Was that duty performed by the defendants? It can hardly be said that the evidence shows that it was. The want of this, or the prompt discharge of Ker or placing him in a less responsible position, was negligence of the grossest kind, from the consequences of which I can see no avenue of escape for the plaintiffs in error in this court.

But that was not all. Early in November, 1882, and more than two months before Ker absconded, notice came to the defendants from Mr. Preston, at Detroit, calling attention of the house here to the reported gambling speculations of some of their employes, and requesting the firm here to make inquiry into the truth of such reports, and also to make careful examination of their securities and of all kinds. Another interview was had with Ker, and Mr. Kean appears to have been very easily satisfied. No examination of any kind as to the securities held for others appears to have been made. David Preston (one of the defendants) seems to have regarded such as an absolute necessity and urged it at times upon the house here; but nothing of the kind was done, and the plaintiffs in error appear to have been profoundly ignorant as to whether their customers' securities were in their possession or not, until the development of the theft by Ker in the latter part of January following—when they claim to have received information from Ker that the defendants in error's bonds, with many others and much other property, had been abstracted by Ker, as he told them. How did the plaintiffs in error even then act toward the defendants in error? About

the middle of March, 1883, they wrote to ascertain whether the books of the defendants in error showed that they (plaintiffs in error) had any bonds, and if so, of what issue, etc., in the hands of the plaintiffs in error.

Now another evidence of negligence of the most grave character on the part of the plaintiffs in error was the manner in which those large deposits (including those of the defendants in error) were kept. Small deposits were kept in a locked tin box in the safe; and a list of them was in the box—to this box no one could have access except the person who had the key. *Ker never had it.* Why were not our bonds kept safely there? But the larger deposits were kept loose in the treasury of the safe, fastened together by broad straps, opened at the end so that they could be seen and counted, and abstracted, and so that the most casual examination would show they were bonds, and no list or record was kept of them; that is, as to whom they belonged, and no examinations were made so as to ascertain if those *large* special deposits or collaterals were safe.

The proof shows that these bonds of the defendants in error were taken from time to time, as required by Ker, extending back a year or more before his departure—sometimes one, sometimes more. Then again, the proof showed that if his deals were fortunate he sometimes replaced a bond he had taken, not the identical bond, of course, but another of the same denomination. Now, a careful examination by the plaintiffs in error into these securities, which was their absolute duty, would have at once developed, first, whether *all* the bonds were there, and if not, then detection was inevitable; but if the quantity was complete, then a careful examination of the

bonds by their numbers, which numbers the defendants, the proof shows, had in their "bond register," would have detected the changed numbers of the substituted bond or bonds, and have at once led to the discovery that there had been somebody manipulating them for some improper purpose, and without any authority. This discovery would have at once placed the plaintiffs in error on their guard; but no such precaution was taken, no care was exercised, all of these valuable securities, of a character to be so easily misappropriated and disposed of, were allowed *to remain exposed to depredation until they were all taken away.*

If this was not negligence most gross on the part of the plaintiffs in error I cannot conceive what gross negligence is. They never knew that $35,000 of bonds, which had been confidingly left in their care by various owners, had been abstracted until they claimed to have learned it from the thief after he had been carrying on these practices, without detection or even suspicion, for a long period previous to his departure.

The letter which he (Ker) wrote to the defendants in error in December, 1882, advising the crediting of the January coupons, was only a plan of his to prevent any inquiry, by keeping up the appearance of business accuracy in making remittances. The bonds were not in the possession of the plaintiffs in error then, and had not been for a very long time.

I have, while prostrated by severe and protracted illness, endeavored to place before your honors the salient points in the testimony upon which, it seems to me, the decision of the case must necessarily turn. I have not attempted to quote from the evidence, for that would have extended this argument to an unreasonable length;

but the proper deductions from it are embodied in the special findings of the learned Circuit Judge (Record pp. 23–28).

Since the foregoing matter was prepared, I have been favored with copies of the arguments of Messrs. Groscup & Wilson, of counsel for the plaintiffs in error. They contain nothing new, nothing that was not urged as strenuously by the learned counsel for the defendants below, before Mr. Justice Gresham, at the time of the trial, especially in the elaborate printed brief of Mr. (now Judge) Horton, who was one of the counsel, and all of which arguments were fully and carefully considered by the learned and excellent Circuit Judge before rendering his decision.

There are, however, some matters in the argument of Mr. Groscup (who was not counsel at the trial) to which I would most respectfully beg to call the attention of the court as being, in my humble judgment, disingenuous and unfair. Mr. Wilson's effort, so far as I conceive it needs an answer, shall receive attention later.

Mr. Groscup starts out with a statement of the length of time the plaintiffs in error had been in business as bankers in Chicago, the amount of their capital, extent of their transactions and their business standing and reputation in the community. I beg to say that there is not a word of evidence in this record on which any such statement or argument can be properly based, but assuming the learned gentleman's introduction to be accurate, I can only say that it is to be regretted that all those years of business experience as bankers had not taught the plaintiffs in error some little degree of prudence and caution in the care and custody of very valuable property entrusted to their care, instead of the culpable carelessness and neglect

which had, as this record abundantly shows, distinguished their handling of the property of the defendants in error, of great value and of a character to be readily abstracted and disposed of by an unauthorized party.

Another statement made by Mr. Groscup in his argument I desire to direct attention to, which is that an examination of the securities belonging to the defendants in error and others would not have been of any avail because Ker had manipulated the bank books and had made false and fraudulent entries therein, and hence that the abstraction of my clients' property could not have been discovered for that reason and necessarily that any examination as to these securities would have been fruitless and unavailing.

Let us see how unfair this argument is. In the first place I fail to find one word of evidence in this record that Ker ever did make false or fraudulent entries in the bank books at all; but suppose him to have done so, how could such conduct of his have had any bearing on the condition of the securities of the defendants in error when it is borne in mind that the proof shows *that no entries relating to these securities* ever appeared in the books of the bank at any time? The plaintiffs in error did not even have a list of them, except in what they called their "bond register" in which they kept the numbers and denominations of bonds which they owned themselves. My clients purchased these bonds from the plaintiffs in error directly, in 1880, and unwisely allowed them to remain in their hands.

But it is gravely argued that the plaintiffs in error are not liable, because it is insisted that the plaintiffs in error gave to our bonds the same care and attention as they bestowed upon certain of their own property which was

kept in the same compartment of the safe as my clients' bonds. Is this so? Did the plaintiffs in error do so? I contend *that they did not.* The evidence shows that the plaintiffs in error examined *their own* valuables *monthly*, and the "special deposits," as they were called (bonds and valuable securities of a kindred character), belonging to the defendants in error and others, were only to be examined *every six months*, or rather that those were the customs of the bank Why this difference? A careful examination by the plaintiffs in error *of their own assets* at short intervals, monthly, would more readily detect anything wrong and be more likely to guard against any unlawful or felonious interference therewith than examinations at the long intervals *of six months*, which the evidence shows it was stated to have been the *custom* of the bank to bestow on the property of their correspondents (the defendants in error and others) which had been in full faith and confidence entrusted to their care.

Some of the assets of *the plaintiffs in error*, i. e., surplus cash and collaterals, were kept in the same compartment of the bank safe as the securities of the defendants in error and others—why, then, I enquire were they, the latter, not looked over and checked off at the same time as the former? Such would, in my judgment, have been only ordinary prudence and caution on the part of the plaintiffs in error and would have evinced a disposition on their part to bestow the same care as to the "special deposits" (as they were called) as they took of property belonging to themselves. This they did not do—why? Let the plaintiffs in error explain if they can. But that is not all. The monthly examinations as to the condition of their own assets were made with unerring regularity, but the half yearly examinations into the "special deposits"

were not made. Mr. Kean, one of the plaintiffs in error, testified upon the trial that the plaintiffs in error did not know for about eighteen months before Ker left whether the bonds of the defendants in error were in the safe of the bank or not, that he (Kean) had not seen them for at least that time. Ker left in January, 1883. This would carry the period of ignorance of the plaintiffs in error back to the summer of 1881 (July.)

Three of the periodical six months' examinations of the "special deposits" should have taken place in that period —*not one of which was made*, as the proof showed. What sort of care was this to take of any valuable property, belonging to others, which had been confided to their care? If ever a record disclosed a case of the grossest negligence, we have it here. But if further proof in that direction were wanting, it is to be found. Ker left January 16, 1883. He left behind him a written confession addressed to his employers, acknowledging the theft by him of *our* bonds and many thousands of dollars in value of similar securities belonging to others, minutely describing them all and naming the respective owners. This letter the plaintiffs in error received shortly after the departure of Ker. It is in evidence, record p. 27, that Kean told Robinson, one of the defendants in error, "that he (Kean) knew of the theft by Ker about the middle of January, 1883." He got the information from Ker's letter.

In view of these facts, how do the plaintiffs in error stand when the proof shows them to have written to the defendants in error on *March 5, 1883, nearly two months* after Ker's departure and *after Mr. Kean* had notice of the theft, as he himself admitted, as follows:

"Do your books show that you should have a 'special

deposit' of government bonds with us? If so, what issue of bonds and what amount?" To which defendants in error (no doubt astonished at such an enquiry) replied on March 8, 1883: "We refer you to *your* advice of July 7, 1880, in regard to our bonds held by you." This was the letter from the plaintiffs in error to the defendants in error notifying them of the sale of $12,000 governments to them (the bonds in question) and giving the denominations and numbers.

In view of all the facts just referred to I cannot help but enquire why was such a letter written? It does appear to me to be a most inexplicable proceeding, and neither of the learned counsel for the plaintiffs in error *has* offered any sort of explanation, and is not this a very extraordinary way for bankers such as Mr. Groscup describes the plaintiff in error to be to transact business? They themselves had sold the bonds in controversy to the defendants in error in July, 1880; they had the denominations and numbers in their bond register and they furnished that information to the defendants in error at the time of the purchase and repeated it when requested in April, 1881, record p. 24.

The account between the banks was a large and profitable one to the Chicago bank.

It amounted to many hundreds of thousands of dollars, of which large sums the Chicago bank was to have the use at all times of $3,000, *without interest*, paying only 2½ or 3 per cent. per annum on the excess over that sum—yet when the Maryville bank required to borrow any money from the Chicago bank, it had to pay 6 per cent. per annum interest thereon.

Mr. Groscup in his argument says: "The Maryville "bank kept 'general deposits' with the Chicago bank,

"averaging in amount from $200,000 to $400,000 annually; "upon these the Chicago bank paid 2½ to 3 per cent. "interest." This is not a fair statement of the evidence; which showed the arrangement between the banks for the payment of interest to have been what I have already stated, $3,000 *at all times without interest* and 2½ per cent. interest on the excess.

This is not perhaps very important, but when counsel is quoting evidence in an argument it is probably better to quote it as it is.

What were the relations of the two banks to each other regarding the custody of these bonds? Were the plaintiffs in error *pledgees* or gratuitous bailees?

What do the dealings between the two banks show, as they appear in this record? Not that I think the disposal of this question can affect the liability of the plaintiffs in error. They are clearly liable *in any event*, as the learned Circuit Judge found after elaborate argument and most careful consideration.

The first use which appears to have been made of the bonds in question, after their purchase, was placing them as collateral security for the payment of a note of the defendants in error to the plaintiffs in error of $12,000. These bonds were thus pledged Dec. 22, 1880. (Record p. 19.)

This note was paid April 27, 1881, in full, was cancelled and returned to the Maryville bank, and the inquiry was then made by the Chicago bank, "What disposition shall we make of the *collaterals*?" The reply of the Maryville bank was, "Hold the bonds as formerly for our use."

The evidence clearly shows that the defendants in error contemplated using the bonds, as they had done be-

fore, as *collaterals*, and that the plaintiffs in error were so advised, first by a letter dated Nov. 24, 1880, asking leave to overdraw on the security of the bonds (permission was granted without hesitation) (Record pp. 20-25), and again by letter in October, 1882, when defendants in error asked and obtained from the plaintiffs in error a discount of $10,000, secured by customers' notes, at the same time explaining why the defendants in error preferred giving this security instead of the bonds, as they wished the bonds held *for an emergency*, for which they might wish to use them. (Record p. 25.)

The whole evidence shows the course of dealing between the two banks, and that was, whenever the Maryville bank required to borrow money from the Chicago bank, either by discounts or by overdrafts, *unless some other collateral was provided*, the bonds *were to be and were the collateral*. No one, I think, can read the evidence and come to any other conclusion, and that both parties so understood it and acted upon it appears to me from the evidence abundantly clear.

The plaintiffs in error were directed in April, 1881, in answer to their inquiry, "What disposition shall we make of the *collaterals*?" "Hold the bonds as formerly *for our use*." (Record p. 24.) How were they held "formerly"? *As collateral security, "and for our use."* What use? *As collateral security* whenever the Maryville bank required money from the Chicago bank, either by way of discounts or in the shape of overdrafts.

These bonds, then, I respectfully contend, were held by the plaintiffs in error to be used as collateral security whenever required, as I claim the proof clearly shows, and the learned Circuit Judge has so found, and if this

position be correct, then the status of the plaintiffs in error was *not* that of *gratuitous bailees*.

I am again forcibly struck with the unfairness of Mr. Groscup's argument on another point, page 13 of his argument, 2d paragraph.

An argument, in my humble judgment, to be legitimately effective, ought not only to be consistent with the facts in evidence, but ought to be *consistent with itself*.

The learned counsel admits, on the preceding page of his argument, that the apparent overdraft of $5,426 (Dec. 21, 1880) never appeared at the Chicago bank in the shape of an overdraft at all, and yet he tries to argue that the bonds could not have been regarded as security for so large an overdraft in addition to the note for $12,000, for which they were pledged, as the value of the bonds did not exceed $13,000, and would necessarily be insufficient security for *$17,126*.

The *next day* after this apparent overdraft of $5,426 was made at Maryville, Missouri, the note of the defendants in error was discounted by the Chicago bank and the proceeds placed to the credit of the Maryville bank, which left a credit over the overdraft referred to of nearly $7,000.

But does not the fact that the defendants in error (as shown by *their* books) had from time to time from Nov. 22, 1880, to Feb. 1, 1883, in accordance with permission asked and granted, and with these bonds specially mentioned as collateral security, made what appeared to be overdrafts on the plaintiffs in error to an aggregate of over $40,000, conclusively show the course of dealing between the banks, and that both of them well understood that such overdrafts were from time to time, as occasion required, to be allowed and protected by the plaintiffs in

error and that for any balance against the defendants in error; *at any and all times the bonds were to be held as collateral security*, and so the learned Circuit judge has in terms found.

Opinion of Gresham, J., Record p. 23, *top*.

It seems to me to be hardly worth while occupying more time on this branch of this case, and I crave pardon of your honors for using the time I have spent in arguing a point so clear.

The position contended for seems to me to be impregnable, for if these bonds were held by the plaintiffs in error as collateral security, then the law is well settled that they did not sustain the relation of *gratuitous bailees*, and are clearly liable in law under the evidence, and as the learned Circuit judge found, being chargeable with *ordinary care*.

But suppose the other position, viz., that the plaintiffs in error were simply *gratuitous bailees*, (a conclusion which I can not see that the evidence warrants) should be taken, how does that help the plaintiffs in error?

A *gratuitous bailee* is not absolved of all responsibility to his principal. He is liable for gross negligence if loss happens thereby. Now let us see whether even in this aspect the plaintiffs in error are not under the evidence clearly responsible.

The great bulk of Mr. Wilson's argument is an attempt to relieve the plaintiffs in error from liability, because, as he claims, they were *gratuitous bailees*, and he argues strenuously (perhaps a little more so than the evidence will fairly warrant) that the plaintiffs in error have not been guilty of that degree of negligence which under the law would render them responsible.

Let us examine this portion in the light of the evidence.

In the first place, Kean himself testified that no examination of the securities of the defendants in error had been made for eighteen months before the departure of Ker; that for that time he did not know whether they were in the safe or not. Even the customary six months' examination had been entirely neglected.

Then when in January, 1882, it was brought to Mr Kean's notice that Ker had been gambling on the board of trade and Ker acknowledged the fact, but said he knew it was wrong and that he would do so no more, but that he had lost nothing, on the contrary, "he was about $1,000 ahead, all told," what did Kean then do, *without investigation* he believed Ker's story and still left the valuables unguarded and open to depredation. If Ker's statement was true, then the entire thefts must have been committed between January, 1882, and November, 1882, (when Ker's access to the safe was cut off). Will it do for Mr. Kean now to say, I believed Ker and relied upon his promise, and therefore I made no examination, and now turn round and says, "Ker may have lied to me, but I had known him long and I trusted him." If Mr. Kean had been dealing with his firm's property alone he might have a right to act so, but when he was the custodian of the property of other people it was gross and inconceivable negligence. When Mr. Kean was first informed of Ker's speculations it became *the absolute duty* of the plaintiffs in error to make *every possible enquiry*, and to take such steps as should be deemed necessary to protect outside parties in interest, either by discharging Ker, placing him in a position of less responsibility, or putting the securities of the defendants in error and others be-

yond his reach. Ker was a dangerous man to have around. Nothing of this kind was done. Ker remained with free access to the safe, going on with his speculations until an anonymous correspondent notified Mr. Preston in Detroit in November, 1882, that some one in the Chicago bank was gambling on 'change. Mr. Preston at once directed the Chicago concern to investigate and to make a careful examination of all assets as well their own as those belonging to outside parties. Was this done? Nothing of the kind, and the plaintiffs in error remained in their usual blissful ignorance until awakened from it by the startling written confession of Ker in January following.

It is true that after Ker had been interrogated the second time as to his board of trade transactions and had told some story about having made some few transactions for friends in Canada as a broker, a story (like the first one) which subsequent developments proved to be untrue, his (Ker) access to the safe was cut off, but no examination *was even then made* to ascertain if any property *owned outside the bank* had been left in the safe to be stolen.—A striking illustration of the old adage, "Locking the stable door after the steed has been stolen."

Ker had been gambling on 'change right along, and as he needed funds to put up the margins on his transactions he helped himself to the bonds of my clients and others without let or hindrance so far as appears.

Again it appeared in evidence that certain securities (probably bonds) belonging to the *plaintiffs in error themselves* were kept in a locked box or locked boxes in the safe to which Ker never had the keys. Why were not my clients' bonds kept in an equally safe place of deposit, but they were not; they were allowed to lie in

the "treasury" compartment of the safe, loosely secured by an India rubber strap, open at the ends, so that the contents of the package could be readily seen and open to the manipulating fingers of any one who wanted one or more of them for use in his gambling transactions, and this state of things was negligently permitted to continue until they *all* were gone.

Both Mr. Groscup and Mr. Wilson have laid great stress upon the fact that Mr. Kean had known Ker for years and therefore was justified in placing credence on the story he told about his speculations, and for that reason that he (Kean) made no investigation to test its truth and took no precaution whatever to protect property belonging to others in his hands.

I cannot agree to this view, neither could Judge Gresham, although it was very strongly pressed upon him at the trial. I think that in both instances the plaintiffs in error were guilty of gross carelessness sufficient to render them liable even if *gratuitous bailees*.

TO RECAPITULATE.

I claim that in any aspect of this case the proof clearly shows that the defendants in error are entitled to succeed, if the plaintiffs in error held the bonds as collateral security for *any* indebtedness of the defendants in error to them. If that were the object and intention of the parties, the defendants in error leaving their bonds and the plaintiffs in error in so holding them, then the law holds the plaintiffs in error *to the exercise of ordinary care, at least* such care as a reasonably prudent and cautious man would take of his own property. There is no pretense, there can be none, that the proof shows that the plaintiffs in error have so acted. The direct contrary clearly appears

from the testimony of the plaintiffs in error themselves. They examined *their own* cash and securities, which were lying side by side with the bonds of the defendants in error, at very short intervals (*monthly*), but totally neglected to make any examination whatever for certainly *eighteen* months before the departure of Ker, into the condition of the valuable property of the defendants in error which had been entrusted to their care; so that it seems to me in this view, (which I respectfully submit to be the correct one) the law is with the defendants in error, and the learned Circuit Judge has so found.

But should *this* court come to the conclusion under the evidence that the plaintiffs in error were merely *gratuitous bailees*, then with equal confidence do I claim that the defendants in error are entitled to judgment.

A gratuitous bailee is responsible for gross negligence, in failing to preserve property committed to his charge.

Such gross negligence of the plaintiffs in error in this case I have already endeavored to point out in detail. I contend that the evidence abundantly establishes it, and the learned Circuit Judge has also so found.

No motion for a new trial or to set aside the finding of the Circuit Judge was made in this cause, as the record shows. This, I submit, was necessary.

Having been confined to my room by illness during the preparation of this argument I crave the kind indulgence of your honors on that account; for this reason I have necessarily been prevented from having the opportunity to examine cases as I should have wished to have done; I therefore beg to refer the court to those cited by my associate, Mr. H. W. Jackson.

I, however, submit that the evidence in the case brings it in every aspect fairly within the rules as announced in

the cases cited by the learned counsel, Mr. Wilson, regarding the liability of gratuitous bailees and tested by those rules, that the plaintiffs in error *are liable*.

The argument applying these cases to the present is in my view wholly fallacious.

I fear that in the preparation of this argument I may be considered to have fallen into the error of repeating myself. Such was not my intention—I only intended *elaboration*—using each of the salient points of the evidence as a basis and arguing thereon—

"No cause was ever so good that it escaped assault, and none was ever so bad that it did not find earnest and capable defenders."

I do not feel that I can usefully add anything, and in conclusion, your honors, I take the liberty of saying that, in my opinion, under any theory presented, the judgment of the Circuit Court was correct under the law and the evidence, and ought to be affirmed.

Most respectfully submitted, by

ROBERT HERVEY,

of Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 115.

DAVID PRESTON, SAMUEL A. KEAN AND ELISHA GRAY,
Plaintiffs in Error,

vs.

JAMES B. PRATHER AND THEODORE L. ROBINSON,
Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

HUNTINGTON W. JACKSON,
ATTORNEY FOR DEFENDANTS IN ERROR.

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Defendants in Error.

STATEMENT OF THE CASE.

This is an action of trespass on the case. The suit was brought by James B. Prather and Theodore L. Robinson, citizens and residents of Missouri, copartners, doing business under the firm name of the Nodaway Valley Bank of Maryville, Missouri, to recover the value of sixteen United States Government bonds of the par value of $12,000, belonging to the defendants in error, and which were stolen while in the possession of the plaintiffs in error, by their assistant cashier.

The declaration contains twelve counts. The first count alleges a delivery by the defendants in error to the plaintiffs in error of sixteen United States four per cent. bonds, eight of the bonds being for $500 each and eight

for $1,000 each, which were to be re-delivered upon request. The count also avers request for re-delivery and refusal.

The second count is similar to the first with the further averment that the plaintiffs in error took such little care and such bad care that the bonds through their carelessness and negligence were lost.

The third alleges that plaintiffs in error had the care of the bonds and that it was their duty to take due and proper care, but that they neglected so to do.

The fourth alleges the delivery of the bonds to be held by plaintiffs in error in special deposit, subject to the order of the defendants in errors for reasonable reward to the plaintiffs in error. It further avers tnat plaintiffs in error took such bad care of the bonds that through their carelessness, negligence or improper conduct the bonds were lost.

The fifth is the same as the fourth, with the omission of the averment that the plaintiffs in error were to receive reward.

The sixth and seventh allege the delivery of the bonds to be by said plaintiffs in error, held as collateral security for a loan of $12,000, made by plaintiffs in error to defendants in error. Said loan being evidenced by a promissory note of $12,000, made by said defendants in error, and which was discounted by said plaintiffs in error, and passed by them, less the amount of the discount, to the credit of said defendants in error on plaintiffs in error's books of account with the defendants in error. They also aver payment of the loan, request for delivery of the bonds, and refusal.

The eighth alleges delivery of the bonds, to be by the

said plaintiffs in error, held as collateral security for the payment of any drafts for money which defendants in error might make upon the plaintiffs in error, in excess of the amount of money which at the time of the drawing of said drafts defendants in error might have on deposit with said plaintiffs in error and for the payments of said drafts, said plaintiffs in error were to receive reasonable reward or interest. It also avers that said drafts for money were made, their payment by the defendants in error, request for re-delivery of bonds, and refusal.

The ninth alleges delivery of the bonds as collateral security for any indebtedness in money which might arise and become due from defendants in error to plaintiffs in error. It also avers that defendants in error became indebted to plaintiffs in error; that said bonds were held as collateral security by said plaintiffs in error; the payment of said indebtednes by defendants in error, and request for delivery of said bonds, and refusal.

The tenth, eleventh and twelfth counts allege, substantially, that defendants in error, while depositors and doing their business with plaintiffs in error at Chicago, purchased the bonds from plaintiffs in error; that the bonds were delivered to and retained by plaintiffs in error, in special deposit, subject to the order of the said defendants in error. They also aver request for re-delivery, and refusal and the loss of said bonds through the negligence and improper conduct of the plaintiffs in error.

To the declaration a plea of "not guilty" was filed by plaintiffs in error, and thereupon defendants in error filed a replication to the plea.

By written stipulation of counsel, the case was heard by the court without an intervention of a jury. Judgment was rendered against plaintiffs in error for $17,913.58.

STATEMENT.

The defendants in error were bankers, doing business at Maryville, Missouri. The plaintiffs in error were also bankers, doing business at Chicago. In 1873, the defendants in error opened an account with the plaintiffs in error, which continued for ten years, or until the spring of 1883, at which time the plaintiffs in error discovered the bonds in question were stolen by their assistant cashier. On the 28th day of November, 1883, the defendants in error demanded their bonds of the plaintiffs in error or their equivalent in money, at which time nothing was due from the defendants in error. On defendants in error's deposits, above $3,000, the plaintiffs in error allowed interest at the rate of 2½% and 3% per annum. The aggregate amount of defendants in error's deposits with plaintiffs in error each year was from $200,000 to $400,000.

On July 7, 1880, the plaintiffs in error sold to the defendants in error $12,000 of four per cent. government bonds—being the bonds in question. The letters from the defendants in error, ordering the purchase of the bonds, concluded: "You will please send us description "and number of the bonds and hold the same as special "deposit for us."

In the account which the plaintiffs in error rendered to the defendants in error of the purchase of the bonds the latter was informed that the bonds were held in special deposit, subject to their order.

All the communication between the defendants in error and plaintiffs in error in regard to the purchase of the bonds, and the subsequent transactions in regard thereto prior to July, 1883, were conducted by letter.

On October 8, 1880, the defendants in error wrote to the plaintiffs in error: "Will it be convenient for you to "discount for us, say up to par of bonds with you as col- "latteral, and if so, at what rate?" In reply to this, on October 11th, plaintiffs in error wrote: "We will dis- "count for you with pleasure, taking your government "bonds at par as collateral."

Nothing apparently was done with reference to this communication until December 22d, at which time the loan of $12,000 was made by plaintiffs in error to defendants in error, as will hereafter more fully appear.

In the meantime, on November 24, 1880, the defendants in error wrote to the plaintiffs in error: "We are "carrying a large amount of hogs and cattle at this time "for our customers and we shall wish to overdraw our "account for a small amount, and we will thank you to "honor the same and will consider our bonds in your "hands as security for the same. We do not wish to over- "draw, but stock may be detained on the road." To which two days later, the plaintiffs in error replied: "Yours "of the 24th inst., is received. In reply we beg to state "that should you have occasion to check on us, as you "suggest, we will pay your checks with (the word "'with' is omitted from transcript of record page 54 in "error) great pleasure." Overdrafts were thereupon made by defendants in error upon the plaintiffs in error.

The account of defendants in error with plaintiffs in error about this time was overdrawn as follows, as shown by plaintiffs in error's books, viz:

November	28, 1880,	overdrawn.....	$ 537 75
"	29, 1880,	"	537 75
"	30, 1880,	"	721 00

The account of defendants in error with the plaintiffs in error during the same period was overdrawn as follows, as shown by the defendants in error's books:

November 22, 1880, overdrawn..... $1,040 00
December 21, 1880, " 5,420 00

On the next day, December 22d, in accordance with the letter of October 8th and 11th, above referred to, the plaintiffs in error discounted defendants in error's note for $12,000, and on the same day notified them that the bonds were held as collateral security for the loan. This note was renewed and about April 25th, four months after the original discount of the note defendants in error wrote to plaintiffs in error to charge up the note to their account and when it came due on April 27, 1881, the plaintiffs in error wrote defendants in error: "We debit "you $12,000 for your note due to-day, which please find "enclosed, canceled; *what disposition shall we make of* "*the collaterals?*" (This question is omitted by mistake in the transcript of record. It appears in the original findings on file in the United States Circuit court at Chicago.) To which query the defendants in error replied: "*Hold the bonds, as formerly, for our use,*" and asked them to send them the numbers in order that the assessor might examine them. The plaintiffs in error again replied on May 5th: "Your favor of the 2d inst., at hand. "We hold $12,000 United States four per cent. bonds as "special deposit." In this letter plaintiffs in error also gave the numbers of the bonds, and informed the defendants in error that the bonds were held subject to their further order.

It also appears from the testimony of defendants in error that after the purchase of the bonds the defendants in

error had overdrawn their account from time to time and that their drafts had been honored.

As shown by the defendants in error's books their account with plaintiffs in error was further overdrawn as follows:

March	21, 1881,	overdrawn.....	$ 450 17
"	26, 1881,	"	2,560 17
January	13, 1882,	"	2,153 71
"	14, 1882,	"	2,334 96
September	7, 1882,	"	1,903 62
"	12, 1882,	"	1,866 14
"	14, 1882,	"	1,731 70
"	15, 1882,	"	2,330 15

On October 11, 1882, plaintiffs in error discounted defendants in error's note for $10.000 at sixty days, receiving as collateral security therefor a number of notes given to the defendants in error by their customers. This note was paid at maturity and the collaterals returned.

In the letter written by the defendants in error asking for said last mentioned loan of $10,000, they informed the plaintiffs in error that they proposed giving the notes of their customers in place of the bonds as collateral, and wished the bonds held for an "emergency, that they "probably might want to use the bonds." (Rec., 53.)

In the next month overdrafts were again made by defendants in error and honored by the plaintiffs in error as they had been before. The account of defendants in error with plaintiffs in error was during this period overdrawn as shown by plaintiffs in error's books, viz:

November	21, 1882,	overdrawn.....	$ 364 16
"	22, 1882,	"	289 53
"	25, 1882,	"	820 58
"	26, 1882,	"	820 58

The account of defendants in error with the plaintiffs in error during the same period was overdrawn as follows, as shown by defendants in error's books:

November	17, 1882,	overdrawn.....	$ 482 02
"	18, 1882,	"	1,274 37
"	20, 1882,	"	2,826 95
"	21, 1882,	"	3,949 92
"	22, 1882,	"	4,207 42
"	23, 1882,	"	4,735 06
February	1, 1883,	"	27 75

On January 16, 1883, the defendants in error wrote (not "went" as it appears in the transcript of record) asking for another loan of $10,000 on the notes of their customers as collateral, as defendants in error "wished to "keep the bonds for emergencies, meaning that defend- "ants in error wanted to overdraw on them." (Rec., 55.)

On January 29th the plaintiffs in error replied to this letter, apologizing for the delay, which had occurred through the oversight of their corresponding clerk, saying: "We telegraphed you to-day that it is all right, meaning "to say that your request for discount is granted."

On January 31st, the defendants in error replied, saying that there had been so great a delay since the application was made that the occasion had passed when they could use the funds to an advantage, and that they did not want them.

On March 5, 1883, the plaintiffs in error wrote to the defendants in error: "Do your books show that you should have a special deposit of Government bonds with "us; if so, what issue of bonds and what amount?" To which the defendants in error replied on March 8th: "We "refer to your advice of July 7th, 1880, in regard to our "bonds held by you."

On March 12, 1883, plaintiffs in error wrote to defendants in error acknowledging their letter of March 8th, and saying they presumed the package of bonds mentioned in their (plaintiffs in error's) letter of July 7, 1880, "should now be found among those held on special de-"posit for our customers," and saying that they did not find defendants in error's package, and that the bonds had undoubtedly been taken by the defaulter, Ker.

It also appears that plaintiffs in error collected the coupons and credited defendants in error with the same to January 1, 1883, by written direction given by defendants in error from time to time.

Frederick E. Ker acted as book-keeper for plaintiffs in error for about ten years previous to May, 1881, and was the assistant cashier from May, 1881, to January, 1883, at a salary of $2,000 a year.

The defendants in error's bonds were kept in the "treasury" part of the safe, where the collateral securities, the bonds of the bank and the reserve or surplus fund of the bank not in active use were kept. From the time Ker became assistant cashier until November, 1882, he had access to the funds and securities of the plaintiffs in error and all the special deposits in the custody of the plaintiffs in error. Ker took $21,500 of the funds of the plaintiffs in error and $35,000 in bonds of other parties in the possession of the plaintiffs in error, including these sued for. Defendants in error's bonds were used by Ker for margins in speculating upon the board of trade in the city of Chicago.

Kean, one of the plaintiffs in error, did not know when the defendants in error's bonds were last seen in the vault. It appears that it was the custom of plaintiffs in error to

examine their securities and count their cash every month, and to examine their special deposits twice a year to see that they corresponded with the amounts marked on the envelopes and were otherwise correct. The collaterals and special deposits were kept together. Ker took none of the collaterals because, as Kean testified, Ker was well aware that plaintiffs in error examined the collaterals, as they did their cash, to see if the collaterals were there.

No record was kept of the numbers of bonds held on special deposit, and they could not be counted and checked off for that reason.

About a year before Ker left some one said to Mr. Kean, "Mr. Kean, I think there is some one in your bank "speculating on the board." After Kean received this caution he made a quiet investigation, and the facts pointed toward Ker, if any one. He therefore called Ker and accused him of having been speculating, to which Ker replied: "I have made a few transactions, but I am "doing nothing now and don't propose to do anything "more." Ker admitted that he had been speculating, and said: "I know I ought not to do it, and I am not go-"ing to do any more of it. I am ahead about $1,000, "all told." It was not known that Ker had any other property besides his income that he received from his salary.

Ker continued in his position as assistant cashier, with access to the funds of plaintiffs in error, as well as the securities of others, without any effort on the part of the plaintiffs in error to verify the truth of his statements or to ascertain whether he had been tempted to appropriate to his own use the property of others.

About two months before Ker left, Preston, one of the

plaintiffs in error, residing at Detroit, received an anonymous communication stating that some one connected with the bank in Chicago was speculating on the board of trade. He thereupon wrote to the bank at Chicago calling attention to the reported speculation of some of the employes, suggesting inquiry upon the subject and directing a careful examination to be made of their securities of all kinds. On receipt of this letter Kean told Ker what he had heard, and asked if he had been speculating again on the board of trade. Ker said that he had made some deals for friends in Canada, for which he received a brokerage, and that the transactions were all ended. Plaintiffs in error then entered upon an examination of the books and securities, but no effort was made to see whether the special deposits had been disturbed. The special deposits, including defendants in error's, were not examined, because no record was kept of them by numbers or otherwise, although the numbers of the defendants in error's bonds did appear upon the plaintiffs in error's bond register at the time of the purchase.

Kean, one of the plaintiffs in error, told Robinson in July, 1883, that he (Kean) did not know until about the middle of January of that year that Ker had stolen the bonds.

On the 28th day of November, 1883, the defendants in error demanded their bonds of the plaintiffs in error, together with April, July and October coupons, or their equivalent in money, on which day there was nothing due from the defendants in error to the plaintiffs in error. The premium on the bonds at this time was 22⅜ per cent., and plaintiffs in error refused to comply with the demands on the sole ground that the bonds were held as

special deposit without reward, and that they were not liable for the loss. The value of the bonds with the coupons thereon prior to the demand, not collected, was the sum of $15,045.00.

ARGUMENT.

Upon the facts stated in the special finding we submit the judgment of the court should be affirmed. We contend that plaintiffs in error are liable, first, as bailees for reward; second, as gratuitous bailees.

(*a.*) Plaintiffs in error did not take the same care of the bonds as they did of their own.

(*b.*) Plaintiffs in error were careless in taking care of their own property; third, when the finding is special the review by the Supreme court extends only to the determination of the sufficiency of the facts found to support the judgment.

Sec. 700, U. S. Rev. Statutes.
Tyng v. *Grinnell*, 92 U. S., 467.

The court, in its opinion and special finding, found that the "sole ground" for which the plaintiffs in error refused to pay the defendants in error was that the bonds were held as special deposit without reward, and that they were not liable for their loss.

First as bailees for reward. The defendants in error had been customers of the plaintiffs in error for nearly ten years. The relations were not those of strangers. The

defendants in error bought the bonds in question from the plaintiffs in error, and the latter presumably charged the usual commission for making the sale. It does not appear that the bonds were ever in the possession of the defendants in error. The defendants in error ordered the purchase of them by letter and directed the plaintiffs in error to hold them. The plaintiffs in error purchased them and retained possession of them for nearly ~~thirteen~~ three years or until the time they were stolen. The account of the defendants in error was a large and valuable one. Plaintiffs in error, as inducement for defendants in error to keep their account with them, allowed interest at the rate of two and one-half per cent. and three per cent. per annum upon deposits exceeding $3,000. On deposits under $3,000 they paid no interest. They thus had the benefit of the deposits of sums less than $3,000 on which no interest was paid, and while they paid three per cent. interest on larger sums it cannot be doubted but that they loaned the sums at a far greater rate of interest. The account was thus, being a large one, very valuable. The aggregate amount of defendants in error's deposits in each year averaged from $200 000 to $400,000. The plaintiffs in error also collected the coupons and credited defendants in error with the same.

On November 24, 1880, and for several weeks subsequent thereto the bonds were held by plaintiffs in error as collateral security to a number of defendants in error's overdrafts, one of which amounted to $5,420.00

On December 22, 1880, the bonds were again held as collateral security to defendants in error's note of $12,000. This note was renewed, the bonds continuing as collateral security. The plaintiffs in error discounted the note, receiving interest thereupon in advance, making them bail-

ees for reward, inasmuch as the depositing of the bonds as collateral security to the note was an essential part of the transaction.

Upon the payment of the note defendants in error, on May 2, 1881 (Rec., 52), directed the plaintiffs in error to "Hold the bonds as formerly, for our use," undoubtedly meaning as security for overdrafts similar to those mentioned in the letter of November 24, 1880, and it was for that reason defendants in error felt justified in making the overdrafts which they did subsequently. On October 11, 1882, and January 16, 1883, defendants in error informed plaintiffs in error they wished to discount their note, giving as collateral security therefor a number of notes of their customers, and, further, desired the bonds held for an "*emergency*, meaning that defendants in "error wanted to overdraw on them." This, as has been seen, had been repeatedly done, and on every occasion the overdrafts were honored. As was said in the opinion of the court (Rec., 47): "The evidence shows that the "agreement continued in force until Ker fled, and that "after it was made the defendants in error did make "overdrafts on the plaintiffs in error, all of which were "paid, some of them only a few months before Ker's dis-"honesty was discovered. If these overdrafts were not "paid on the security of the bonds they were paid without "security, which is not to be presumed in the absence of "proof. The right of the plaintiffs in error to hold the "the bonds against the defendants in error and all others "as collateral security for any balance due to them from "the defendants in error is too plain for dispute, and it "follows that having this right, their responsibility was "that of pledgees." Defendants in error knew that they were making large overdrafts upon plaintiffs in error, and

if they had not arranged for this "emergency," they would not have dared to overdraw their accounts. Having made the arrangement, they felt secure. They felt assured that the overdrafts would not be thrown out while the bonds were held as collateral. Situated as they were in a distant state, they would not have dared to overdraw their account without having deposited collateral security. It certainly was never intended that the bonds were to be kept by plaintiffs in error simply on deposit as gratuitous bailees. The whole course of business shows that they were left with plaintiffs in error as security for their loans and overdrafts. Otherwise it would have been more nature for defendants in error to have sent for the bonds and kept them under their own control. The whole business course shows that they were left with the plaintiffs in error for the "use" of the defendants in error, and for "emergencies."

Nor will it be contended, we think, that the plaintiffs in error would have honored the overdrafts of a country bank without being abundantly protected. If, therefore, the plaintiffs in error were bailees for reward, then it was their duty "to exercise that degree of care in the safe "keeping of the bonds which a reasonably prudent and "cautious man would exercise in the care of his own "property of the same kind." (Rec., 46.) The proof we submit shows that this was not done. The finding shows (Rec., 57) that Kean, who was one of the plaintiffs in error, and in charge of the bank, did not know when the defendants in error's bonds were last seen in the vault; that no record was kept of the number of bonds held as special deposit, and they could not be counted and checked off for that reason. (Rec., 58.) Is this a sufficient reason for the excuse? There was nothing to prevent

them from being "counted" and "checked," as the amounts of the special deposits were marked on the envelopes (Rec., 57), and the number of defendant in error's bonds appeared upon plaintiffs in error's bond register. (Rec., 59.) It is said (Rec., 57) that it was the custom of plaintiffs in error to examine their securities and special deposits twice a year. The court will observe that it was only a "custom." It does not appear that an examination of the bonds was ever made between November, 1881, and the spring of 1883. The contrary rather appears. The finding states they were not "counted" or "checked." It appears (Rec., 51) that the bonds were stolen some time between November, 1881, and November, 1882. If there had been an examination between these dates, the theft of the bonds would have been discovered. The failure to discover until the spring of 1883 renders it certain that there had been no examination for a period of about sixteen months.

Again, when Mr. Kean (Rec., 58) was informed that some one in his bank was speculating "*and the facts "pointed towards Ker*," and Ker was interviewed and admitted the charge, still Ker was retained in his position as assistant cashier with access to the securities without any effort on the part of the plaintiffs in error to verify the truth of his statements or to ascertain whether he had been tempted to appropriate to his own use the property of others. Again, when the plaintiffs in error were a second time informed about two months before Ker left that he was speculating, they entered upon an examination of the books and securities, but no effort was made to see whether the special deposits had been disturbed. The special deposits, including the defendants in error's bonds, were not examined, because no record

was kept of them by numbers or otherwise, although the numbers of the defendants in error's bonds did appear upon the plaintiffs in error's bond register at the time of the purchase, as did also the amount, on the envelope thus enabling them to make the examination if they had been disposed to. (Rec., 59.)

From the numerous authorities supporting the position contended for, that the plaintiffs in error are liable under the circumstances above mentioned, we cite the following:

The case of the *Third National Bank* v. *Boyd*, 44th Maryland Reports, 47, is an important one. There "the firm, W. A. B. & Co., of which W. A. B. was a senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th of February, 1866, the firm was indebted to the bank about $5,000 and W. A. B. voluntarily proposed to the president of the bank to deposit with the bank about $37,000 in bonds as collateral security for his present and future indebtedness. Subsequently as agreed between W. A. B. and the president of the bank, certain bonds and stocks were deposited as collateral security for the payment of all obligations of W. A. B. and W. A. B. & Co., to the bank then existing, or that might be incurred thereafter with the understanding that the right to sell such collaterals in satisfaction of such obligations, was vested in the officers of the bank. Some of the bonds were subsequently withdrawn and others deposited in their place. While these collaterals remained in the bank the firm kept a deposit account with the bank having an average amount of about $4,000 on deposit, and from time to time, as itt needed, obtained discounts ranging from $2,000 to

$15,000 on the security of the collaterals; it sometimes owed the bank nothing, but left the bonds in its vault; at times when the firm wanted money for a short time, it obtained it from the bank on the security of these collaterals, on what were called "call loans," by checks.

The officers of the bank considered the account of the firm a very desirable one, and the arrangement by which every liability of them was secured by the collaterals, very advantageous to the bank. The firm was not indebted to the bank subsequent to July, 1872, when it paid its last indebtedness; the bonds were not withdrawn but, left in the bank under the original agreement. Between Saturday evening the 17th, and Monday morning the 19th of August, 1872, the bank was entered by burglars and certain of the bonds were stolen."

"In an action by W. A. B. against the bank to recover the value of the bonds which were stolen, it was held: First. That the contract entered into by the bank was not a mere gratuitous bailment. Second. That the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the plaintiff's debt had been paid. Third: That the defendant was responsible if the bonds were stolen, in consequence of its failure to exercise such care and diligence in their custody and keeping; banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant. Fourth. That the proper measures of damages was the

market value of the bonds at the time they were stolen. Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide."

The case of *Dearborn* v. *Union National Bank*, 61 Maine, 372, was a suit brought to recover the value of certain bonds which, it was claimed, had been left at the bank as collateral security for money which the bank might, from time to time, advance the plaintiff. The plaintiff testified that on July 1, 1868, he went to the bank to obtain a loan upon this security; that the bonds could not be found, but that he received the money.

The defendant requested the court to instruct the jury that "if the bonds were not found by the bank when the "note of July 1st was offered, and were not afterwards "found, the jury were not authorized to find that they "were taken and held as collateral security for the note "of July 1st." Held, that this instruction was properly refused.

The court in its opinion said: "We see no sufficient "ground for setting aside the verdict as against the evi- "dence. There was positive evidence that the bonds "were deposited with and demanded of the bank, and "there was no evidence that they had been returned. "Whether they were left as collateral security or special "deposit without compensation, was a question of fact "for the jury alone to determine, and was also the de- "gree of care actually exercised by the bank in the keep- "ing of them, under the plenary instructions received "from the court. Whether the jury predicated their find- "ing upon the one or the other theory of the plaintiff as "to the character of the bailement does not appear; nor

" is that material since there was evidence applicable to " both."

The case of Cutting as receiver, etc., *Appellant* v. *Marlor*, 17th Hun, 573, was an action brought by the plaintiff as receiver of the Bankers and Brokers Association to recover a loan made by it to the defendant.

The defense was that certain stocks and bonds belonging to him had been deposited with the association to secure the loan, and that they had been converted by its president, one Bonner. The justice before whom the action was tried, found that the trustees of the association had been guilty of negligence in failing to inspect the affairs and securities of the association, and in failing to exercise proper vigilance over the management of its affairs, and held that this negligence in the trustees rendered the association liable for the conversion of the defendant's securities.

The judgment was affirmed by the general term of the Supreme court, and again affirmed by the court of Appeals. The opinion is in the 78th New York, page 457. The court said: " It appears that the president had been " in the habit of abstracting securities and using them in " his own private business for six months prior to the " failure of the bank, but that most of the securities had " been returned to the bank when called for; that Oley, " the manager, had knowledge of this habit of the presi- " dent, and took no means to prevent it, or to notify the " other trustees."

"The bailment was for the mutual benefit of the above parties, and in such a case the bailee is bound to exercise ordinary care at least: and in determining what constitutes such care, the nature and value of the property, and the means of protection possessed by the bailee, and

the relation of the parties and other circumstances must be considered. The securities were negotiable and valuable, and the corporation possessed ample means of keeping them safely and securely. Besides, the association was under an implied obligation or contract by the transaction itself, to return the securities to the defendant when the debt was paid. The failure to do so, rendered the corporation presumptively liable for conversion. The onus was upon it to relieve itself from that liability."

"The trial judge has found that the association did not exercise reasonable diligence in respect to the care and custody of these securities, and we think that the evidence fully justified the finding."

"This was not a special deposit. The corporation occupied at least the position of bailee for hire, and was under obligation to exercise at least ordinary care. The finding that such care was not exercised was justified by the evidence. Bonner was a notorious dealer and speculator in stocks. He had been engaged for many months in abstracting securities held by the bank for his private purposes, and he had not done this secretly, but openly and publicly. The manager, who was also a trustee, knew that these acts were being done, and it is difficult to see why his knowledge and neglect were not imputable to the corporation itself. If all the trustees or a majority had known of these transactions, and had not at once removed Bonner, or prevented their recurrence, they would have been guilty of culpable dereliction of duty. The corporation is represented by its trustees and managers; their acts are its acts; their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition they were required to exercise such supervision and

vigilance as a discreet person would exercise over his own affairs."

"The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice especially those so openly committed and easily detected as these are shown to have been."

"There was actual knowledge on the part of the managing trustee, and his silence and inaction without adopting any measures of prevention amounted to acquiescence in the wrong, and it would not be a strained inference from the business of Bonner, and the publicity of the acts, and other circumstances, that the other trustees either had reason to suspect what was going on, or if not, they were grossly negligent of their duties. *We concur with the learned trial judge, that a system of management of a banking-house, in which such conduct of its officers was permitted, was a breach of duty, and grossly negligent towards its dealers, and persons having stocks and bonds in its keepings.*"

"It is argued that the negligence shown was not the approximate cause of the loss, and that with the utmost vigilance it would have been possible for the president, who had access to the vault, to have abstracted the securities. This may be true, but the position is not tenable. The exercise of ordinary care would have discovered the wrongful practices, because they were not secret, and were actually known to the managing trustee, and if known, the trustees, had the power, and it would have been their duty, to have effectually prevented it, and the presumption is that they would have done so. The negligence related to the cause of the loss, viz.: the abstracted

collaterals for private use, which ordinary vigilance would have discovered and prevented."

In the present case Kean knew that Ker was speculating, and the exercise on his part of ordinary care would have prevented the abstraction of the bonds.

See, also,

Second National Bank of Erie v. *The Ocean National Bank*, 11th Blatchford, 362 and 369.

In *Archer* v. *Walker*, 38th Indiana, 472, "A and B, bankers and partners, to enable the firm to draw sight drafts on New York for current exchange, borrowed from B a number of United States bonds, and deposited them in New York as collateral security against overdrafts, the firm stipulating in writing that said bonds were "to be returned or accounted for to B." The bonds were stolen from the bailee in New York. Held that the firm was liable to B for the loss."

"During the time the bonds were held by the bank, the firm frequently overdrew their account in pursuance of their agreement, but at the time the bonds were stolen, the account was not overdrawn."

When the bailment is reciprocally beneficial to both parties the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect.

Story on Bailments, Sec. 23.

One in whose hands pawns are deposited as collateral for a loan made is a bailee for hire.

Erie Bank v. *Smith, Randolph & Co.*, 3d Brewster, 9.

Second. Plaintiffs in error are liable as gratuitous bailees.

As said by the court (Rec., 48): "It is immaterial "whether the plaintiffs in error were bailees, with or "without reward, as in either case they are liable for the "value of the bonds, the loss having resulted from their "gross negligence."

The evidence of this is conclusive. Ker took $21,500 of the funds of the plaintiffs in error, and $35,000 in bonds of other parties in the possession of the plaintiffs in error, including these sued for. Plaintiffs in error do not appear to have been careful of their own property, for there is nothing to show they knew of their own loss until after Ker's disappearance January 16, 1883; although they testified to having made an examination of the books and securities, except the special deposits. But the fact that they were careless of their own, will not relieve them of liability to the defendants in error. (Rec., 46.) A year before Ker left, the plaintiffs in error knew that he had been speculating on the board. Ker continued in his position, with access to the funds of the plaintiffs in error as well as the securities of others, without any effort on the part of the plaintiffs in error to ascertain whether he had been tempted to appropriate to his own use the property of others.

Again, about two months before Ker left, the plaintiffs in error were informed that some one connected with the bank was operating on the board of trade. Kean, one of the plaintiffs in error, had a talk with Ker which practically amounted to nothing. Plaintiffs in error then entered upon an examination of the books and securities, which was apparently fruitless, but no effort was made to see whether the special deposits were disturbed. (Rec., 58, 59.)

Greater negligence than this on the part of the plaintiffs in error, occupying the responsible position of bankers, can hardly be imagined. Twice they were told that their assistant cashier was speculating, but substantially nothing was done. Certainly nothing that amounted to anything. A careful examination would undoubtedly have shown the embezzlement of their own funds as well as those of their customers, for according to the finding defendants in error's bonds were stolen some time between November 1881, and November 1882, (Rec., 51) the last date being about the time of the second conversation Kean had with Ker about speculation.

It is almost certain that plaintiffs in error knew nothing of the theft of the bonds until three months after its commission, and until almost two months after the disappearance of Ker. While it appears Kean told Robinson in July, 1883, that he (Kean) did not know until about the middle of January of that year that Ker had stolen the bonds, the documentary evidence would indicate it was not until March 5, 1883, that they discovered the loss. (Rec., 56.) They did not know of the theft on January 16, 1883, for on that day, being also the same day on which Ker absconded, defendants in error wrote to plaintiffs in error for a loan on their customers' notes, adding that they wished to keep the bonds for "emergencies." On January 29, the plaintiffs in error replied that the request for the discount would be granted. Thirteen days after the disappearance of Ker they were ignorant of the theft and authorized defendants in error to overdraw their account, and by implication, upon the understanding that the bonds which had already been stolen would be held as collateral security.

In the case of *National Bank* v. *Graham*, 100 U. S.

Report, 699, where the facts, as reported in the same case in 85th Pa. State Report, page 91, are very similar to the case at bar. It was held that gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. The court further said: "Here "gross negligence is conclusively established. The de- "positor kept an account in the bank. The cashier cut "off and collected the coupons and placed the proceeds "to her credit. The bonds, therefore, entered into "legitimate and proper business of the institution."

In the above case, it appears that the bonds were kept in the safe inside the vault in the bank. On the 5th August, 1871, the bonds were stolen. The fact that the loss occurred by theft was not denied, but the manner of the theft was not explained in any way. It was shown that other parties, as in the present case, had left bonds at different times in the bank for safe keeping, and that some of the directors knew of this habit of receiving them on the part of the cashier. It was in evidence, that having obtained the information that the bonds were stolen from outside source, about two weeks after the theft, Miss Graham made inquiry at the bank and they told her that they were stolen. The interest on the bonds was credited to her on the books of the bank, and was paid to her for two years subsequent to the loss. The evidence of gross negligence on the part of the plaintiffs in error in the case at bar is, we submit, much stronger than in the case just cited.

See also,

Lancaster County National Bank v. *Smith*, 62 Pa. State Report, 47.

In the case of *Maury* v. *Coyle*, 34th Maryland, 235, A deposited with M. & Co., bankers, for safe keeping, certain

coupon bonds of the United States, bearing interest, payable in gold on the first day of May and November, in each year. These bonds were subsequently abstracted from their custody. After their abstraction, a receipt, dated as of the day when the deposit was made, was given by the bankers to A, in which they promised to return the bonds on demand, or pay the full value thereof, including the gold interest. The bonds were never returned. In an action against the bankers to recover the value of these bonds it was held: First, that the plaintiff was entitled to recover, if the loss or abstraction of the bonds occurred through the failure of the defendants to use such care as persons of common prudence, in their situation and business, usually bestow in the custody and keeping of similar property belonging to themselves,

Pattison v. *Syracuse National Bank*, 80th New York, 82.

Ganley v. *Troy State National Bank*, 98th New York, 487.

A bailee without reward is required to use such care and discretion in the performance of a duty as may be expected of all men of common prudence in their own affairs.

Skeeley v. *Kahn*, 17th Illinois, 170.

In the case of *The United Society of Shakers* v. *Underwood*, 9th Bush., page 621, the court says: "It is the "duty of the bank directors to use ordinary diligence to "acquaint themselves with the business of the bank, and "whatever information might be acquired by ordinary "attention to their duties they may, in controversies with "persons transacting business with banks, be presnmed "to have. They cannot be heard to say that they were

" not apprised of facts shown to exist by the ledger books,
" accounts, correspondence, reconcilements and state-
" ments of the bank, and which would have come to their
" knowledge except for their gross neglect or inattention.

" It is sufficient in an action such as this to show that
" the evidence of mismanagement or misconduct were
" such that it must have come to the director's knowl-
" edge, unless they were grossly negligent or willfully
" careless in the discharge of their duties. In such a case
" the presumption of actual knowledge arises."

In the above case in an action brought against the directors it was held they were responsible for the abstraction and sale of a special deposit by the officers of the bank.

Naked bailees are guilty of gross negligence who retain in office one whose integrity may be reasonably suspected; but even where there is no ground for specially believing a man dishonest, if he is known to be a speculator, to indulge in stock and gamble, that alone should disqualify him from holding a place of trust. *Scott* v. *National Bank of Chester Valley*, 72 Pennsylvania, 471; *Gibbons* v. *Mullin*, 2 Privy Council R., 327.

In *Tracy* v. *Wood*, 3 Mason, 132, the court held the bailee without reward guilty of gross negligence if he omits that reasonable care of property committed to his charge, which a person in the like situation exercises, or which the bailee is accustomed to exercise in like cases.

Gross negligence is to be considered with reference to the nature of the goods delivered to the bailee without reward. If money is delivered, it is to be kept with more care than common property.

(*a.*) Plaintiffs in error did not take the same care of the bonds as they did of their own.

The bonds in question were kept in the treasury part of the safe where the collateral securities, the bonds of the bank and the reserve or surplus funds of the bank not in active use were kept. It appears that it was the custom of plaintiffs in error to examine their own securities, and count their cash every month, and to examine their special deposits twice a year, to see that they corresponded with the amounts marked on the envelopes, and were otherwise correct. It was their custom, therefore, to examine their own securities twelve times during the year, and the special deposits only twice, but we have already demonstrated, we think, that it must have been impossible to have made an examination of the special deposits subsequent to November, 1881. By the special finding it also appears that the bonds were neither "counted nor "checked off." (Rec., 58.)

Again, when Preston, at Detroit, wrote to the bank directing a careful examination to be made of their securities *of all kinds*, an examination of the books and securities was entered into, but no effort was made to see whether the special deposits had been disturbed. Here was a discrimination in favor of their own property.

(*b.*) Plaintiffs in error were careless in taking care of their own property.

The Circuit court judge said: "It does not follow that "they are not liable if they were as diligent in caring for "these bonds as they were in taking care of securities of "their own, for they may have been careless of the lat-"ter." (Rec., 46.) The evidence of carelessness on the part of plaintiffs in error is found in the following facts: Ker took $21,500 of the funds of the plaintiffs in error, and yet the theft was not discovered until after his flight. Plaintiffs in error, after they first heard that Ker had

been speculating, permitted him to continue to have access to the funds. When the second time in November, 1882, they knew he had been speculating, they entered into an examination of the books and nothing was discovered. How careless must have been the examination which accomplished nothing, although a theft of $21,500 had been committed. Ker still remained with the plaintiffs in error for about two months after this time.

If it appears that a bailee was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others intrusted to him.

Erie Bank v. *Smith, Randolph & Co.*, 3rd Brewster, 15.

Pattison v. *Syracuse National Bank*, 80th New York, 99.

Doorman v. *Jenkins*, 2d Ad. and Ell., 256.

Tracy v. *Wood*, 3d Mason, 132.

It will not exempt the depositary from liability for gross negligence that he has kept the deposit in the same place or with the same care that he has kept his own property.

Story on Bailments, Sec. 64 a.

And if the bailee is shown to have taken less care of the bailed goods than of his own, that may furnish a strong and perhaps in some cases a decisive presumption of negligence.

Story on Bailments, Secs. 337 and 338.

Reply to Brief in Behalf of Plaintiff in Error, Samuel A. Kean.

Since preparing the foregoing brief, we have received the argument of counsel for Mr. Kean, plaintiff in error.

The court will observe that with the exception of the statement that Ker was in the employ of plaintiffs in error for ten years; that Ker converted $21,000 of the cash of plaintiffs in error and $35,000 of the bonds of its customers, among them being the bonds in question, there is nothing in the record to support the other statements made on the first and second pages of the brief. They are foreign to the record, and will not be regarded by the court, otherwise we would desire to make extracts from the testimony which does not appear in the special finding. There are also other statements which do not appear in the record.

On the lower part of page 5 counsel says: "Inasmuch as "the bonds were stolen some time between November, "1881, and November, 1882, the defendants in error "were not, in fact, indebted to the plaintiffs in error on "account of overdrafts upon any day when the bonds or "any one of them were abstracted."

Is not this a mistake?

The account of defendants in error with plaintiffs in error, as shown by the books of plaintiffs in error, was overdrawn four times in November, 1882, and the account as shown by the books of defendants in error was overdrawn during the months of January, September and November, 1882, fourteen times.

Counsel says, page 7, referring to the first interview of Mr. Kean with Ker as to his speculating on the board,

that no effort was then made to ascertain if Ker had appropriated any of the securities. The excuse given by counsel for this omission is, that "it does not appear that "such effort, if made, would have disclosed his (Ker's) "speculations or would have shown that his transactions on "the board were other than as he had stated them. In "fact it does not appear that any of the bonds in question "were appropriated by Ker after the incident above "named. They were taken during a period both ante-"dating and post-dating this incident, but whether before "or after the finding of facts does not show."

Ker disappeared January 16, 1883. The conversation took place about a year before Ker left. If an examination had then taken place it would have been discovered if Ker had taken the securities before that time. If he had taken them, it is possible they might have been recovered, but as there was no examination, either after the first or second interview, we submit the plaintiffs in error upon the authorities already cited, were guilty of gross negligence. Counsel again says, page 8, referring to the second interview: "It does not appear that had the "facts of their theft been then known, it would have "brought about their recovery, either by the bank or by "the defendants in error." Defendants in error were not called upon to show that such examination would have resulted in the discovery of the bonds. When defendants in error showed that plaintiffs in error had been guilty of negligence, the burden of disproving this fell upon plaintiffs in error. It was the duty of plaintiffs in error to show that an examination would have been unavailing.

It is beyond controversy that if an examination had been made at the time of the second interview with Ker,

and possibly at the first, the theft would have been discovered, and as it appears that the bonds were used by Ker for margins in speculating upon the board of trade in the city of Chicago (Rec., 57), who can say that upon a discovery of the theft Ker would not have disclosed where the bonds had been used? With this information, under the provision of the Illinois statutes, Sec. 178, 179, Chap. 38, Criminal Code, declaring gambling in grain void, the firm could have proceeded for the recovery of the bonds. But not the slightest effort was made to ascertain if the bonds were in the bank.

Counsel says (p. 8) that after the examination of the books and securities was entered upon, referring to November, 1882, Ker was excluded from further access to the safes. This is again repeated on page 23 of brief. This fact nowhere appears in the record. The only part of the record which gives color to such a statement is that which reads as follows (Rec., 17): "From the time "Ker became assistant cashier until November, 1882, he "had access to the funds and securities of the defendants "and all the special deposits in the custody of the de- "fendants." That is very different from saying that he was excluded at that time from further access to the safes. The record shows that the bonds were stolen by Ker between November, 1881, and November, 1882, and that he had access to the safe until November, 1882. It does not show that he did not have access after that time. If he was excluded, what is the reason for such exclusion? Was the confidence in Ker shaken? If it was, why was not a closer examination of the books and securities made? The record, however, shows that Ker was retained until he disappeared two months later, notwithstanding the two warnings in relation to his speculations.

Counsel says, page 12, the overdrafts shown in the books of the defendants in error within this period, between November, 1881, and November, 1882, are of no importance. This is a strong assertion. The testimony shows that there were many overdrafts, and in large amounts made by defendants in error. It was on account of an "emergency" that defendants in error wanted plaintiffs in error to hold the bonds. The fact that but few overdrafts appear by the books of plaintiffs in error during the fall of 1882, argues nothing in favor of plaintiffs in error. Defendants in error knew that they were making large overdrafts upon plaintiffs in error and if they had not arranged for this "emergency," they would have been unwilling to take the risk of overdrawing their accounts. In the month of November, 1882, defendants in error's account was overdrawn six times, once for $4,735.00. During all this time plaintiffs in error had a lien upon the bonds for the payment of the overdrafts.

Having made the arrangement they had the right to feel secure and it was immaterial to them whether their remittances to plaintiffs in error promptly reached them or not, for they were assured that the overdrafts would not be thrown out while the bonds were held as collateral. Will plaintiffs in error contend that defendants in error would have had the temerity to overdraw their account without having collateral security with plaintiffs in error? The correspondence shows they would not. Will any one contend that plaintiffs in error would have honored the overdrafts of a country bank in the distant state of Missouri, without having the bonds as collateral security? Any bank which would do so would be guilty of violating the first principles of banking business.

The court will observe other statements in the brief, notably on pages 15, 16, 19, 20 and 23 not found in the record. We regret that all the testimony in this case is not before the court, but as plaintiffs in error exercised their right in asking for a special findings, we submit that the arguments should be based thereon.

The cases cited by counsel are different from the case at bar.

In *Foster* v. *Essex Bank*, 17 Mass., 479, the bailment was gratuitous. It was also shown that the deposit was kept with the same care as the specie of the bank. (Page 480.)

It was also shown there was no negligence in the *continuance* of the cashier in the office. It was also shown that neither the bank nor its officers had control of the chest or gold in it. (page 504.) In the present case, plaintiffs in error had control of the bonds, as they collected the coupons (Rec., 56), as was also the case in *National Bank* v. *Graham*, 100 U. S. R., 703.

The case of *First Natl. Bk.* v. *Ocean Natl. Bk.*, 60 N. Y., 278, is also a case of gratuitous bailment, and the property was stolen by burglars. This case approves, see page 294, of *Wiley* v. *First Natl. Bk.*, 47 Vt., 546. The latter case is disapproved of by this court in *National Bank* v. *Graham*, 100 U. S., 703. The former case (60 N. Y., 278-284) is also different from the case at bar in this, that there "the bonds in question were the ab-"solute property of the plaintiff. The defendant had no "special property in them. It had no lien upon them, and "they were not deposited or held as security for or in con-"nection with the business of the defendant as a banking "corporation, or its transactions with the plaintiff, either "present or prospective." (Page 284.)

In the case of *First National Bank of Allentown* v. *Rex*, 89 Pa. State R., 312, the court below "charged "that the mere fact that Bloomer, the president, had used "the bonds to raise money for his own private purposes, "would not of itself make the bank liable, but if this im- "proper use by him of the plaintiff's property was known "to the bank officers and they assented thereto, or if "they had knowledge thereof and made no effort to re- "cover this property, if it were recoverable, that would "be such negligence on their part as would render the "bank liable."

In commenting upon this charge the court said, "this "is good sound law."

The case of *Giblin* v. *McMullin*, 2 Privy Council Appeals, 317, was a case of gratuitous bailment. There the court said, "the exact time at which this act of dishonesty "was committed cannot be ascertained, but it must have "been before the month of July, 1864, as Fletcher then "left the bank on leave of absence and never returned. "*Up to the time of his leaving he had always maintained a* "*good character*."

Smith v. *First National Bank*, 99 Mass., 605, was a case of gratuitous bailment. It was not known by whom the theft was committed. The court said, "the evidence "went far to show that the bank did use due care in "all its arrangements for the safety of the securities de- "posited." It also said, "there was no evidence of neg- "ligence in the selection of cashier or his clerks, or *in* "*permitting them to be retained after notice of unfitness*."

Reply to Additional Brief and Argument for Plaintiffs in Error.

The argument of counsel proceeds on the theory that the bailment was without reward, and as the theft of the bonds was committed between November, 1881, and November, 1882, plaintiffs in error, therefore, could not be held liable for any act of negligence subsequent to November 1882.

We have discussed these points so fully in our argument that but little more remains to be said. As was said in *Reynes* v. *Dumont*, 130 U. S., 394, each case is to be governed by the circumstances controlling it. We submit that when the residences of the respective parties to this suit are considered, their relation to each other, the character of their business, the course of dealing between them, and their correspondence, the conclusion is irresistible that the bonds were bought and placed with the plaintiffs in error as collateral security as the occasion or "emergency" might arise. The bonds were bought in July 1880 (Rec., 51), and all the circumstances tend to show that they were left with the plaintiffs in error for the purpose of being used as security for loans and overdrafts. They were first used as collateral security November 24, 1880 (Rec., 53), and again December 22, 1880 (Rec., 52), and they were repeatedly so used after this.

Counsel says (p. 7 of his brief) "The account was over-"drawn in pursuance of this notification on the 28th, 29th "and 30th days of November, 1880, and was not overdrawn "again until November 21, 1882, after the bonds were stolen." This statement is correct if the testimony is con-

fined simply to the books of the plaintiffs in error. (Rec., 54.) But an examination of the books of defendants in error (Rec., 54) shows that between November 22, 1880, and November 23, 1882, the account was overdrawn eighteen times, varying in sums from $482.02 to $5,426. When defendants in error wrote the plaintiffs in error to "Hold the bonds as formerly for our use," (Rec., 52) it is clear what they meant. The bonds had been used in November, 1880, as security for overdrafts, and again on December 22, 1880, as security for a loan of $12,000. This last loan had been paid off, and in reply to the question, "What disposition shall be "made of the *collaterals*," (Rec., 52) defendants in error replied: "Hold the bonds as formerly for our use." They desired the bonds to be continued to be held in the same way for their "use." When plaintiffs in error replied that they held the bonds as "special deposit," this in no way changed the arrangement for the "use" of the bonds. There is no hidden meaning in the words, "special deposit." In the case of *Foster* v. *Essex Bank*, 17 Mass., 479, the special deposit was a keg containing a quantity of gold; in another case it was a tin box, and so on *ad infinitum*. These articles had been left for safe keeping. They were not to be used as collateral security or for "emer- "gencies." In the present case the deposit was of government bonds belonging to the defendants in error, and left with plaintiffs in error for a particular purpose, not a mere naked bailment, but for "use" and "emergencies." If at any time defendants in error became indebted to plaintiffs in error, the latter had a lien upon the bonds until the indebtedness was paid. See *Reynes* v. *Dumont*, 130 U. S., 391, and authorities cited.

The position that plaintiffs in error are not liable for

any negligence after November, 1882, is not tenable. The proof shows that the bonds were stolen between November, 1881, and November, 1882, not between November, 1881, and "November 1, 1882," (as suggested by counsel, brief 16), but some time between the whole month of November, 1881, and the whole month of November, 1882. We have already pointed out the abundant evidences of negligence of plaintiffs in error, not only during that period but subsequent thereto. It is beyond question, if the plaintiffs in error had exercised care during the period between November, 1881, and November, 1882, the theft would have been discovered and the bonds might possibly have been recovered. It is equally true that if subsequent to that period plaintiffs in error had exercised care, a like result would have followed. We contend not only that plaintiffs in error are liable for the theft of the bonds committed between November, 1881, and November, 1882, but also that their liability, if possible, was increased by their continued gross negligence up to and even subsequent to the date of Ker's flight.

Any excuse for Ker's gambling, or any excuse for Kean's neglect to investigate, only makes the evil and negligence more conspicuous. To justify either would be fraught with the most pernicious consequences. Plaintiffs in error owed a duty to their customers, for the neglect of which they should be held liable. The responsible position occupied by Ker and the limited salary received by him of $2,000 per annum, made it all the more imperative upon Kean to make a thorough investigation. He was content, however, with accepting Ker's statement. He made no inquiries as to the name of the brokers with whom Ker dealt; nor does he appear to have inquired as

to the magnitude or extent of the transactions. No attempt was made to confirm Ker's statement.

In conclusion, we claim that the finding of the court fully supports the judgment, and, in the language of the opinion of the court (Rec., 48) submit that: "It is immaterial whether the plaintiffs in error were bailees "with or without reward, as, in either case, they are liable "for the value of the bonds, the loss having resulted from "their gross negligence."

Respectfully submitted,

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